IN THE

Supreme Court of the United States

October Term, 1964

No. [redacted] 4

MARC D. LEH, individually and THE PROGRESS COMPANY, a copartnership comprised of MARC D. LEH and DAVID BROWN, co-partners,

Petitioners,

vs.

GENERAL PETROLEUM CORPORATION, a corporation, STANDARD OIL COMPANY OF CALIFORNIA, a corporation, TEXACO INC., a corporation, RICHFIELD OIL CORPORATION, a corporation, UNION OIL COMPANY OF CALIFORNIA, a corporation, TIDEWATER OIL COMPANY, a corporation,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on April 2, 1964.

Citations to Opinions Below.

The opinion of the District Court in granting summary judgment against the petitioners is reported at 208 F. Supp. 289 (1962), and is attached hereto as Appendix C.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 330 F. 2d 288 (1964), and is attached hereto as Appendix A.

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 2, 1964 (Appendix B). The time for filing this petition for writ of certiorari was on June 29, 1964, extended to and including August 1, 1964 (Appendix E). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Questions Presented.

1. Is an action for treble damages under the antitrust laws an action for a penalty?

2. Is resort to be had to state or federal law for "characterization" of the cause of action created by 15 U. S. C. §15 as penal or compensatory?

3. If resort is to be had to state law for such "characterization," is the law of the state a question of fact to be reviewed on appeal under the "clearly erroneous" test, or a question of law?

4. If resort is to be had to state law for such "characterization," is a decision of a Superior Court of the State of California binding upon federal courts?

5. If resort is to be had to state law for such "characterization," and the law of the state is that reference is to be had back to federal law, is not the federal "characterization" binding?

6. Whether the statute of limitations was tolled by Section 5 of the Clayton Act during the pendency of the Government's action in *United States v. Standard Oil Company of California, et al.* (Civil No. 11584-C)?

Statutes Involved.

The statutes involved are Sections 1 and 2 of the Sherman Act, 15 U. S. C. Sections 1 and 2; Section 4 of the Clayton Act, 15 U. S. C., Section 15; and Section 5 of the Clayton Act, 15 U. S. C., Section 16, as amended, 15 U. S. C., Section 16(b) (1955).

Statement of the Case.

Petitioners by complaint filed September 28, 1956, alleged that a conspiracy was initiated among respondents in 1948 unlawfully to restrain and monopolize interstate commerce in the distribution and sale of refined gasoline, and that respondents then and thereafter combined to exclude petitioners from the wholesale distribution and sale of gasoline, both by controlling sales to petitioners and by eliminating petitioners' sources of supply [R. 2-27]. It is conceded that petitioners' cause of action accrued no later than February, 1954, and that the applicable statute of limitations commenced to run at that time, unless suspended under Section 5 of the Clayton Act (15 U. S. C. §16, as amended, 15 U. S. C. §16(b) (1955)) by a similar proceeding "instituted by the United States."

It is further conceded that the four-year limitations period with respect to private causes of action under the anti-trust laws is inapplicable to a cause accruing in 1954. Petitioners contend that the similar proceeding which during its pendency suspended the applicable statute of limitations was *United States v. Standard Oil Company of California, et al.* (Civil No. 11584-C) [R. 1136-1158].

Respondents by answer denied petitioners' allegations and asserted by way of affirmative defense that peti-

tioners' action was barred by the applicable statute of limitations [R. 98-157]. Subsequently respondents moved for a summary judgment of dismissal upon the defense of time-bar [R. 612-616; 1182-1183], which motion was granted [1209-1227], and from which an appeal was prosecuted to the United States Court of Appeals for the Ninth Circuit.

The District Court held that the applicable statute of limitations was California Code of Civil Procedure §340(1) providing a one-year period to govern actions to recover "upon a statute for a penalty or forfeiture, . . ." [R. 1209-1227]. The Ninth Circuit affirmed, stating that the holding of the District Court cannot "be held clearly erroneous." (App. A, p. 29) (330 F. 2d at 301).

REASONS FOR GRANTING THE WRIT.

I.

The Decision of the Court Below Is in Total Conflict With Chattanooga Foundry & Pipe Works v. Atlanta, 203 U. S. 390, 27 S. Ct. 65, 51 L. Ed. 241 (1906), and the Purposes of Congress in Enacting the Anti-Trust Laws.

An action to recover damages resulting from a violation of the Sherman Act is not an action to recover a penalty.

Chattanooga Foundry & Pipe Works v. Atlanta, 203 U. S. 390, 27 S. Ct. 65, 51 L. Ed. 241 (1906).

Throughout his opinion Judge Barnes mounts an increasing attack upon the *Chattanooga* holding. In footnote 4 of his opinion (330 F. 2d at 290) he points out that only two cases were cited in *Chattanooga* to

support the Court's conclusion. In footnote 7 (330 F. 2d at 293-294) he points out that the Second Circuit distinguished *Chattanooga* in *Bertha Building Corp. v. National Theatres Corp.*, 269 F. 2d 785, 788-789 (2nd Cir. 1959). At page 19 of the opinion (Appendix A) (330 F. 2d at 296) he refers to the discussion by the Ninth Circuit in *Flintkote Co. v. Lysfjord,* 246 F. 2d 368, 398 (1957), of the penalty theory lying behind treble recovery in anti-trust litigation. Finally, at pages 23 and 24 of the opinion (Appendix A) (330 F. 2d at 298-299), *Chattanooga* is repudiated:

> "But no matter the reason, the amount awarded over and above compensation is to penalize—to do more than compensate. * * * What is recovered under Section 7 of the Sherman Act (15 U.S.C. §15) is no less a penalty on the wrongdoer than is the fine and imprisonment with which the sovereign can threaten the violator under Sections 1 and 2, or the forfeiture of articles transported in commerce, as provided for in Section 6. (15 U.S.C. §6) The treble damage provision cannot be clasified as exemplary damages, in the ordinary legal sense of that phrase, for in antitrust the jury has no authority or discretion to decline to award, or as to how much to award, once the compensatory amount of damages is determined. But we insist it has some attributes of a penal statute."

The above-quoted language is significant. Though starting out "to prognosticate . . . the result at which a state court would arrive" (Appendix A, p. 4) (330 F. 2d at 290), all pretense is gone at page 24 of the opinion (Appendix A) (330 F. 2d at 299) and the personal pronoun is used. The opinion cannot be viewed otherwise than as a direct repudiation of the holding of this Court in *Chattanooga, supra.*

II.

The Decision of the Court Below Is in Conflict With the Fundamental Concept That a Cause of Action Arising Under Federal Law Must Be Uniform Wherever the Action May Be Brought.

The ultimate question presented by respondents' motion for a summary judgment of dismissal upon the defense of time-bar was whether to apply the California statute of limitations governing actions to recover "for a penalty or forfeiture." The answer to that question turned upon whether the private anti-trust action was "penal" or not. But the threshold question, involving a fundamental question of federalism, was whether California law or federal law was to determine the "nature" of, or "characterize" as penal or non-penal, the private anti-trust cause of action. The District Court decided to use California law (298 F. Supp. at 292). On appeal petitioners adopted this as the correct approach to the problem. However, after the briefs were filed, but before oral argument, this Court handed down its decision in *Simler v. Connor,* 372 U. S. 221, 83 S. Ct. 609, 92 L. Ed. 2d 691 (1963). At oral argument petitioners asked the Ninth Circuit Court to consider the problem without reference to petitioners' concession in view of the decision of this Court in *Simler v. Connor, supra.* Amici Curiae also lodged with the Court after the oral argument a motion for leave to file a brief in support of the proposition that resort must be had to federal law for "characterization" of the cause of action created by 15 U. S. C., Sec. 15. Though the motion was denied, the cases the Amici parties cited with the motion were considered by the court (Appendix A, p. 3, fn. 2) (330 F. 2d at 289, fn. 2). The Court held that

resort must be had to state law to determine the "nature" of the private antitrust cause of action as penal or nonpenal. This placed the Ninth Circuit in conflict with itself and with the fundamental concept that a cause of action arising under federal law must be uniform wherever the action may be brought.

A. The Ninth Circuit Is in Conflict With Itself.

In *Smith v. Cremins,* 308 F. 2d 187, 189 (9th Cir. 1962), the Ninth Circuit held that:

> "In determining which period of limitation to apply to an action under a particular federal statute, the federal court accepts the state's interpretation of its own statutes of limitations, *but determines for itself the nature of the right conferred by the federal statute.*" (Emphasis added.)

The Ninth Circuit in *Smith v. Cremins, supra,* relied in part upon an antitrust case, *Moviecolor Limited v. Eastman Kodak Co.,* 288 F. 2d 80 (2nd Cir. 1961), cert. den., 368 U. S. 821, 82 S. Ct. 39, in which the Court said at page 83:

> "In dealing with federally created claims both federal and state law must sometimes be consulted to determine whether the borrowed period has run. Thus, when a state has established different periods of limitation for different types of actions, a federal court enforcing a federally created claim *looks first to federal law to determine the nature of the claim* and then to state court interpretations of the statutory catalogue to see where the claim fits into the state scheme." (Emphasis added.)

See also:

Leonia Amusement Corp. v. Loew's Inc., 117 F. Supp. 747, 751-752 (S.D. N.Y. 1953).

As the court below points out in footnote 4 to its opinion (App. A, p. 5, fn. 4) (330 F. 2d at 290, fn. 4), it has stated in so many words that, "An action to recover damages resulting from a violation of the Sherman Anti-trust Act is not an action to recover a penalty."

Hicks v. Bekins Moving & Storage Co., 87 F. 2d 583 (9th Cir. 1937).

The decision of the court below, however, looks to state law to determine the nature of the federally created claim being enforced in federal court and insists, in so many words, that an action to recover damages resulting from a violation of the Sherman Anti-Trust Act "has some attributes of a penal statute." (App. A, p. 25) (330 F. 2d at 299).

Simler v. Connor, 372 U. S. 221, 83 S. Ct. 609, 9 L. Ed. 2d 691 (1963), was a diversity case in which the cause of action was created by Oklahoma law. This Court nonetheless held that federal law, not state law, determined whether the cause of action was "equitable" or "legal". If this is true of a cause of action created entirely by state law, how much more so should it be true that federal interpretation of a federal law should govern its "characterization".

B. A Cause of Action Arising Under Federal Law Must Be Uniform Wherever the Action May Be Brought.

Federal interpretation of the federal law will govern, not state law.

Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U. S. 448, 457, 77 S. Ct. 912, 918, 1 L. Ed. 2d 972, 981 (1957).

The problem here concerns the enforcement in a federal Court of a right created by Congress; and federal law, not state law, must control in determining the rules governing enforcement in federal courts of rights and remedies created by federal statutes.

Holmberg v. Armbrecht, 327 U. S. 392, 66 S. Ct. 582, 90 L. Ed. 743 (1946);

Sola Elec. Co. v. Jefferson Elec. Co., 317 U. S. 173, 63 S. Ct. 172, 87 L. Ed. 165 (1942);

Local 19, Warehouse Union v. Buckeye Cotton Oil Co., 236 F. 2d 776, 780-781 (6th Cir. 1956), cert. den., 354 U. S. 910, 77 S. Ct. 1293, 1 L. Ed. 2d 1428 (1957).

This court said in *Sola Elec. Co. v. Jefferson Elec. Co., supra*, 317 U. S. at page 176, 63 S. Ct. at page 173, 87 L. Ed. at page 168:

> "It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. * * * When a federal statute condemns an act as unlawful the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield."

The decision of the court below is in direct conflict with the concept of uniformity. Recognizing "the inherent difficulty of diverse judicial interpretations in the various States as to the essential nature of private multiple-damage actions" (App. A, p. 15) (330 F. 2d

at 295), the court attempts "to prognosticate . . . the result at which a state court would arrive . . ." (App. A, p. 4) (330 F. 2d at 290). An opinion under which a private antitrust cause of action may be penal in California, not penal under the federal system, and may or may not be penal in the forty-nine other states, is inherently incongruous.

In *Englander Motors, Inc., v. Ford Motor Company,* 293 F. 2d 802 (6th Cir. 1961), the Court was faced with the identical problem here presented. The Sixth Circuit held at page 806 that it was clear "that under federal law private actions for treble damages under the anti-trust laws are not regarded as penal in nature, but as compensation."

In another setting, this Court in *Jerome v. United States,* 318 U. S. 101, 63 S. Ct. 483, 485, 87 L. Ed. 640, 643 (1943), discussed the problem at some length at page 104:

> "At times it has been inferred from the nature of the problem with which Congress was dealing that the application of a federal statute should be dependent on state law. Examples under federal revenue acts are common. *Douglas v. Willcuts,* 296 U.S. 1; *Helvering v. Stuart,* 317 U.S. 154, and cases cited. But we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is nationwide (*United States v. Pelzer,* 312 U.S. 399, 402) and at time on the fact that the federal program would be impaired if state law were to control. *Seaboard Air Line Ry. v. Horton,* 233 U. S. 492, 503."

The decision of the court below presents a serious impairment to the federal program, not only in antitrust, but in all fields where "characterization" of the nature of the action may become an issue. This runs the gamut from antitrust, to civil rights, to taxation. In any of these fields, the decision of the court below makes it possible for a federal court enforcing a right created by Congress to "characterize" the nature of the right one way in California, another way under the federal system, and so on variously through the remaining states. This is anomalous and directly contrary to the pronouncements of this Court above set forth.

III.

The Decision of the Court Below Is in Total Conflict With the Decisions of This Court That the Law of a State Is a Question of Law, Not Fact, and Is Not to Be Reviewed on Appeal Under the "Clearly Erroneous" Test.

In all actions tried upon the facts without a jury findings of facts shall not be set aside unless clearly erroneous.

Fed. Rules Civ. Proc. Rule 52(a), 28 U. S. C.

The Court below asks itself whether it is to seek an original solution of the problem presented or merely to determine whether the trial court's conclusion and opinion is clearly erroneous. (Appendix A, p. 4) (330 F. 2d at 290). It concludes that "the latter is the proper measuring stick, and under it, after some soul searching," affirms the District Court. (Appendix A, p. 4) (330 F. 2d at 290).

However, whether the District Court applied the proper standard to essentially undisputed facts is a question of law, not fact.

> *United States v. Parke, Davis & Co.*, 362 U. S. 29, 44, 80 S. Ct. 503, 512, 4 L. Ed. 2d 505, 515 (1960).

In *Lamar v. Micou*, 114 U. S. 218, 5 S. Ct. 857, 859, 29 L. Ed. 94, 95, this court held at page 223:

> "The law of any State of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof."

Moreover, the District Court itself did not purport to find, as a matter of fact, the law of the State of California. The trial judge made a holding, not a finding:

> "Treating the question as *res integra*, as I now deem it to be, and having due regard for State-court interpretation of the content of the provisions of both §338(1) and §340(1), I must hold that the one-year period specified in Cal. C.C.P. § 340(1) is the California statute of limitations properly applicable to Federal treble-damage anti-trust causes accruing prior to the effective date of the Federal four-year statute. (15 U.S.C. § 15b.)" (App. C, p. 43) (208 F. Supp. at 294).

The decision of the court below is in total conflict with the long-established doctrine that courts of the United States take judicial notice of the law of any state of the Union, and that the law of a state is therefore not a question of fact, but one of law.

IV.

The Decision of the Court Below Is in Conflict With the Opinion of This Court in United States v. Gerlach Livestock Co., 339 U. S. 725, at 753, 94 L. Ed. 1231, at 1250, 70 S. Ct. 955, at 970 (1950), That a Superior Court of the State of California Is Not a Local Court but a Part of a System of State Courts, Whose Decisions Are Binding Upon Federal Courts.

The California analogy to the Sherman and Clayton Acts is the California Cartwright Act, providing treble-damages under the State's antitrust law.

California Bus. & Prof. Code §16750, as amended;

California Bus. & Prof. Code §16750(a) (1959).

The issue of the application of California C. C. P. Sec. 338(1) or California C. C. P. Sec. 340(1) to a Cartwright Act cause of action was decided by the Superior Court of the State of California in and for the County of Fresno in the case of "Charles S. Ehrhorn, dba Navy Gas Co., plaintiff, vs. Camino! Company, a California Corporation, et al.," No. 97179 in the records of said Court. That decision was reprinted in full as an appendix to appellants' opening brief in the court below and is printed as Appendix D to this brief. It holds that the three year statute of limitations applies. Petitioners argued in the court below that the holding was binding on the federal courts, as California law, under the opinion of this Court in *United States v. Gerlach Livestock Co.*, 339 U. S. 725, 753, 84 L. Ed. 1231, 1250, 70 S. Ct. 955, 970 (1950).

Footnote 23 to *Gerlach, supra,* states:

> "23. Sacramento & San Joaquin Drainage District Co. vs. Superior Court in and for Colusa County, 196 Cal. 414, 432, 238 P. 687, 694. This is not a local court but a part of a system of State courts. It seems to fall within the rule of Fidelity Union Trust Co. vs. Field, 311 U.S. 169, 61 S. Ct. 176, 85 L.Ed. 109, as a court whose decrees are regarded as determination of state law rather than within the rule of King v. Order of United Commercial Travelers of America, 333 U.S. 153, 68 S. Ct. 488, 92 L.Ed. 608."

Though the *Gerlach* case, *supra,* was cited by petitiners in their opening brief in the Court below, was sought to be distinguished by respondents in their brief, and was re-cited and quoted by petitioners in their reply brief in the Court below, it receives no mention in the opinion of the Circuit Court. Instead, that Court quotes from its own opinion in *State of California v. Fred S. Renauld & Co.,* 179 F. 2d 605 (9th Cir. 1950), to the effect that federal courts are bound, by state court decisions at the trial level, only when a goodly number of the trial courts of the state generally and for a considerable period of time have adhered to a common interpretation of the point.

State of California v. Fred S. Renauld & Co. supra, was decided January 12, 1950. *Gerlach, supra,* was decided June 5, 1950. The opinions are in conflict and the later opinion is that of this court in *Gerlach, supra,* presumably written with knowledge of the Ninth Circuit opinion in *State of California v. Fred S. Renauld & Co., supra.* Yet no mention is made of *Gerlach, supra,* in the opinion of the Court below and that

opinion restates with approval the principles laid down in *State of California v. Fred S. Renauld & Co., supra.* Certainly the members of the bar of the State of California are entitled to know whether trial court decisions of that state are to be treated in federal courts in accordance with *Gerlach, supra,* or as stated by the Ninth Circuit in *State of California v. Fred S. Renauld & Co., supra.*

V.

The Decision of the Court Below Is in Conflict With King v. Order of United Commercial Travelers of America, 333 U. S. 153, 68 S. Ct. 488, 92 L. Ed. 608 (1948), in Refusing to Follow the Decisions of Intermediate Appellate Courts of the State of California Holding Federal Law Authoritative Under the California Anti-Trust Laws.

The opinion of the court below states that federal courts, in determining what state law is or is to be, must follow an opinion of the Supreme Court of that state, or an opinion of an intermediate appellate court, citing *King v. Order of United Commercial Travelers of America, supra.* But it is well settled in California that federal decisions under the Sherman Act are authoritative in cases under the California Cartwright Act.

Shasta Douglas Oil Co. v. Work, 212 Cal. App. 2d 618, 625, 28 Cal. Rptr. 190 (1963);

Milton v. Hudson Sales Corp., 152 Cal. App. 2d 418, 440, 313 P. 2d 936 (1957);

Rolley, Inc. v. Merle Norman Cosmetics, Inc., 129 Cal. App. 2d 844, 849, 278 P. 2d 63 (1954).

Under *King v. Order of United Commercial Travelers of America, supra,* the court below was bound to follow the above-cited California decisions and refer to the federal decisions as authoritative. This the Court did not do, because under federal law private actions for treble damages under the antitrust laws are not regarded as penal in nature, but as compensation.

> *Englander Motors, Inc. v. Ford Motor Co.,* 293 F. 2d 802, 806 (6th Cir. 1961).

The Court below distinguished *Milton v. Hudson Sales Corp., supra,* and *Rolley Inc. v. Merle Norman Cosmetics, Inc., supra,* on the ground that neither case passed upon nor approached the statute of limitations question, nor decided whether treble damage provisions are penal or remedial. In other words, the court below regarded itself as bound by *King v. Order of United Commercial Travelers of America, supra,* only if the state court decision was "on all fours". It did not follow state court decisions referring to the federal cases under the Sherman Act as authoritative. If the court below had followed such decisions, it would have had to characterize the private action for treble damages as remedial, in accordance with the federal weight of authority.

> *Englander Motors Inc. v. Ford Motor Company, supra,* at 805.

VI.

The Decisions of the Court Below in This Case and in Steiner v. 20th Century Fox Film Corp., 232 F. 2d 190 (9th Cir. 1956), Are in Conflict With Decisions of the Seventh and Tenth Circuits Construing the Tolling Provisions of the Second Paragraph of Section 5 of the Clayton Act.

A. The Plain Meaning of the Statute.

Section 5 of the Clayton Act provides that, when the government proceeds, "the running of the statute * * * in respect of * * * every private (anti-trust) right of action * * * based in whole or in part on any matter complained of in (the government) * * * proceeding shall be suspended during the pendency thereof."

> 15 U. S. C. §16, as amended, 15 U. S. C. §16(b) (1955).

The plain meaning of this statute is clear enough. If petitioners' private right of action was even partly based upon any matter complained of in *United States v. Standard Oil Company of California, et al.*, Civil No. 11584-C, then the statute of limitations was tolled during the pendency of the Government case.

A "plain meaning" interpretation of the antitrust statutes was endorsed by this Court in *Radovich v. National Football League*, 352 U. S. 445, 454, 77 S. Ct. 390, 395 (1957) as follows:

> ". . . Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of §5 of the Clayton Act. Emich Motors Corp. v. General Motors Corp.,

> 1951, 340 U.S. 558, 71 S.Ct. 408, 95 L.Ed. 534. In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

A "plain meaning" interpretation of the tolling provisions of the statute serves an important public policy. As the Court said in *Christensen v. Paramount Pictures, Inc.*, 95 F. Supp. 446, 454 (D. Utah 1950):

> "Tolling the statute of limitations protects the plaintiff while his right of action ripens, and rewards him for witholding his suit at a time when it is the policy of the law to free the defendant from its annoyance."

If the tolling provisions of 15 U. S. C. §16 are narrowly construed, the well-advised plaintiff will sue promptly as soon as the filing of the Government suit makes it appear that he may have a cause of action. He will not risk the possibility that the statute of limitations is running against his claim during the pendency of the Government suit. As a consequence, the defendant in the Government suit will likely find that he is a defendant in many private suits brought by plaintiffs anxious to protect their rights of action. This cannot be the result which Congress intended.

B. The Steiner Case Was Wrongly Decided.

Steiner v. 20th Century Fox Film Corp., 232 F. 2d 190 (9th Cir. 1956), involved a suit brought by the lessor of a movie theatre against individual lessees and various theatre corporations for monopolizing the exhibition of motion pictures by, among other things, the leasing of theatres for less than a fair rental. Plaintiff

lessor claimed that she had been coerced into accepting a low rental by threats that otherwise her theatre would not get first-run pictures and that a competing theatre would be built to show first-run pictures.

The "pivotal issue" was whether plaintiff's claim was barred by the statute of limitations, or whether the running of that statute had been tolled under 15 U. S. C. §16 during the pendency of *United States v. Paramount Pictures,* Equity No. 87-273 (D.C.S.D.N.Y.).

The court held that plaintiff had not alleged a case sufficiently similar to the *Paramount* case to toll the statute of limitations. The court said: "A greater similarity is needed than that the same conspiracies are alleged. The same means must be used to achieve the same objectives of the same conspiracies by the same defendants." 232 F. 2d at 196.

To the extent that *Steiner* appears to require a private plaintiff who would toll the statute of limitations to plead the same overt acts as the Government has pleaded, it cannot be correct. The Government doesn't have to plead any overt acts whatever. The cases are collected in footnote 59 to *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 224, 60 S. Ct. 811, 845 (1940).

In evolving its stringent *Steiner* test, the court relied in part on *Christensen v. Paramount Pictures, Inc.,* 95 F. Supp. 446 (D. Utah 1950). This reliance was misplaced. In *Christensen,* the District Judge held that the Utah statute of limitations was tolled by 15 U. S. C. §16, as to defendants named in the *Paramount* complaint. The portion of the *Christensen* case apparently referred to in *Steiner* appears at 95 F. Supp. at 455.

It reads: "When Congress used the words 'any matter complained of' it referred to acts of the *named* defendants of which the Government might complain in any suit or proceeding." (Emphasis supplied.) The distinction under consideration was the difference between "named" defendants and "unnamed defendants." It had nothing to do with a distinction between the defendants' conspiracy and the overt "acts" which they may have committed in furtherance of that conspiracy.

Momand v. Universal Film Exchange, 43 F. Supp. 996 (D. Mass. 1942), particularly pages 1011-1013, was also relied upon by the court in *Steiner.* A close reading of those pages will reveal that with respect to a number of the plaintiff's causes of action, the statute of limitations was deemed to have been tolled. To be sure, the court in *Momand* did exclude other causes of action from the tolling provisions of 15 U. S. C. §16. The decision cannot, however, be taken as an authoritative statement of the law in view of the trial court's statement:

> "Since judgments there could not serve as prima facie evidence here, those proceedings cannot toll the statute of limitations for the benefit of this plaintiff. This is clear from the juxtaposition of the two paragraphs which together constitute Section 5 of the Clayton Act." 43 F. Supp. at 1012.

This statement is incorrect. The test of the first part of the statute, which deals with prima facie evidence, is narrower than the second part, which deals with the tolling of statutes of limitation. See *Union Carbide & Carbon Corp. v. Nisley,* 300 F. 2d 561, 569 (10th Cir. 1962). This is most obviously demonstrated

in the situation in which the Government loses. Clearly no *prima facie* case can be made by plaintiff based on the Government's loss. But it is nowhere suggested that the statute of limitations could not be tolled during the pendency of an unsuccessful Government suit. See *Union Carbide & Carbon Corp. v. Nisley,* 300 F. 2d 561, 571 (10th Cir. 1962).

Similarly, when the government accepts a consent decree before any testimony has been taken, that decree may not be used by a private plaintiff as evidence against those who were defendants in the Government suit. 15 U. S. C. §16. But the statute of limitations on private actions based upon matters of which the Government has complained is surely tolled. *Radio Corp. of America v. Rauland Corp.,* 186 F. Supp. 704, 709-10 (N.D. Ill. 1956).

In addition to the above two District Court cases, which do not upon analysis offer any foundation for *Steiner,* the court relied upon the legislative history of the statute. The Ninth Circuit said:

> "In writing this provision ('any matter complained of') Congress made reference to the matters complained of in the public conspiracy action, not the conspiracy itself." See 232 F. 2d at 196.

If the statement refers to the preceding quotation from H. R. Rep. No. 627, 63rd Cong., 2d Sess. p. 14, then it is without support in the whole passage from which the quotation is taken. If it refers to some other expression of Congressional intent, then it is not supported by a citation.

The quotation from the House Report is part of a discussion which reads, in whole, as follows:

> "Section 6 provides that a final decree obtained by the United States in a suit to dissolve a corporation or unlawful combination may be offered in evidence in a suit brought by a private suitor for damages under the antitrust laws by reason of the unlawful acts of the defendant corporation, and that when such decree or judgment is so offered it shall be conclusive evidence of the same facts and be conclusive as to the same questions of law as between the parties in the original suit or proceeding. This section also provides that the statutes of limitations shall be suspended in favor of private litigants who have sustained damage to their property or business by the wrongful acts of the defendant during the pendency of the suit instituted by or on behalf of the United States. The entire provision is intended to help persons of small means who are injured in their property or business by combinations or corporations violating the antitrust laws.
>
> "It is in keeping with a recommendation made by the President in his message to Congress on the general subject of trusts and monopolies."

The "wrongful acts of the defendant" mentioned in this passage are the acts which cause the plaintiff's injury. Such acts must of course be pleaded and proven by a private plaintiff before he can recover damages. But the passage does not suggest that any particular acts (other than a "conspiracy itself," in the language of *Steiner*) must be pleaded or proven in the Government case. On this latter point, the passage

is simply silent. And the case law is settled: the Government makes its case by pleading and proving the conspiracy alone, without showing any overt acts whatever. *United States v. Socony Vacuum Oil Co.*, 310 U. S. 150, 224, 60 S. Ct. 811, 845 (1940), footnote 59, and cases cited.

Finally, the Ninth Circuit itself in *20th Century Fox Film Corp. v. Goldwyn*, 328 F. 2d 190, 219-220, fn. 58 (9th Cir. 1964), has recently intimated that it may agree that the *Steiner* case was wrongly decided:

> "58. It is therefore unnecessary for us to decide whether this is likewise true with regard to conspiracies to exclude independently produced films from affiliated theatres, as charged in other sections of the *Paramount* complaint. Nor, in view of the disposition which we have made of this matter, do we find it necessary to pass upon plaintiff's contention that the *Steiner* case was wrongly decided. The cogent arguments made in support of that contention we leave for determination in some future litigation in which such a decision may be required."

C. The Steiner Case Is in Conflict With Decisions of the Seventh and Tenth Circuits.

The month after the Ninth Circuit decided *Steiner v. 20th Century Fox Film Corp., supra,* the Seventh Circuit decided the case of *Grengs v. 20th Century Fox Film Corp.*, 232 F. 2d 325 (7th Cir. 1956), cert. denied 352 U. S. 871, 77 S. Ct. 96. The *Grengs* case was a treble damage action brought by a former motion picture exhibitor who alleged that he had been run out of business by a conspiracy which embraced both some *Paramount* case defendants and some local exhibitors

who had not been parties to the *Paramount* case. The trial court dismissed as to all defendants. On review, the Seventh Circuit analyzed a number of the statute of limitations problems and concluded that plaintiff's causes of action were barred as to certain defendants but not as to others. In comparing the plaintiff's complaint with the Government complaint in the *Paramount* case, the court said:

> "(Plaintiff's) amended complaint sets forth a right of action arising under the antitrust laws of the United States and, in so doing, *duplicates violations* of said laws charged against the same distributor defendants in the Paramount case. Thus plaintiff sets forth a private right of action which is, at least in part, grounded on the same matters of which the Government complained in the Paramount case." 232 F. 2d at 330. (Emphasis added.)

Just what were those "violations" which Grengs' complaint "duplicated"? The only such "violations" which were pending in the *Paramount* case for long enough to help Grengs were the defendant's "vertical integrations". (See 232 F. 2d at 333 where the court said:

> "Thus it was . . . determined that the vertical integrations were active aids to the conspiracy . . . (and were) therefore violations of the act. The amended complaint herein charges such vertical integrations . . . Hence this action was not barred by the statute of limitations . . .")

Thus it can be seen that the *Grengs* case is clearly inconsistent with the *Steiner* case. *Steiner* insists that "the same means must be used to achieve the same objectives of the same conspiracies by the same defend-

ants." (232 F. 2d at 196.) The *Grengs* case represents the better rule.

The Tenth Circuit has also recently addressed itself to the problem. In the case of *Union Carbide and Carbon Corp. v. Nisley*, 300 F. 2d 561 (10th Cir. 1962), that court considered the *Steiner* case, but refused to follow it. The *Nisley* court rejected the idea that "the tolling provisions of the second paragraph of Section 5 are confined to or governed by the evidentiary rules of estoppel, necessarily prevalent in the first paragraph." 300 F. 2d at 570. As the court explained, "The competency of a government judgment in a private suit is necessarily restricted to the requirements of due process. But the tolling of the statute during the pendency of the government litigation is not so limited." 300 F. 2d at 569.

It further rejected the idea that a private plaintiff should "be put to the necessity of bringing suit on the same conspiracy alleged in the government suit, or suffer the bar of the statute as to every overt act not complained of in the government suit. This interpretation would lead to a multiplicity of suits with duplication of proof. It would add to the burdens of the private suitor to the harassment of the defendants. We do not think Congress intended any such result." 300 F. 2d at 570.

The Tenth Circuit held in the *Nisley* case that "there was substantial identity of subject matter, and this was sufficient to suspend the running of the statute." 300 F. 2d at 570. This is a broad test, and wholly incompatible with the test propounded by *Steiner*.

The *Steiner* case has been no better received in the District Courts than in the Circuits. In the case of *United Banana Co. v. United Fruit Co.*, 172 F. Supp. 580 (D. Conn. 1959), the Court acknowledged the *Steiner* case, but held:

> "The substance of (the Government's) Louisiana action was that United Fruit was a nation-wide monopoly with power, for one thing, to set prices. The substance of the first count of the present declaration is that United Fruit had monopoly power in the Connecticut market area, by virtue of which it set arbitrary prices and injured the plaintiffs. It is not necessary that the Government set out these very acts in its complaint; substantial, not absolute, identity of matters is all that is required." 172 F. Supp. at 590.

Radio Corp. of America v. Rauland Corp., 186 F. Supp. 704 (N.D. Ill. 1956), holds that the important thing is the conspiracy alleged by the Government, and not the particular kinds of harm alleged to result therefrom. There, counter-claimants alleged injury in their sale of radio apparatus. They sought a ruling that the statute of limitations as to appropriate counter-defendants was tolled by each of two Government suits. The court so held. As to the first, the court said:

> "It is true that the cause of action set forth in the counterclaim is based on damage and injury occurring from acts alleged to have hindered and hampered business in the sale of *radio receiving apparatus*, while the Government's complaint was designed to restore competitive conditions in the field of *telephony* . . . Nevertheless, the basic con-

spiracy complained of in the counterclaims and as set forth in Pars. 91 through 95 of the Government complaint in the telephone case appears to be the same." (186 F. Supp. at 709; emphasis added).

As to the second, the court said:

"While the Government was primarily concerned with the *incandescent lamp business* in the complaint referred to, it is also quite clear that the government considered this as part and parcel of a division of fields and territories between the lamp, radio, and telephone groups and that an effort was specifically made to terminate the arrangements created in the GE-AEI agreement of 1939 as they applied to all apparatus, *including radio.*" (186 F. Supp. at 712; emphasis added.)

In *Philco Corp. v. Radio Corp. of America,* 186 F. Supp. 155 (E.D. Pa. 1960), the court took a somewhat different tack. It construed plaintiff's complaint to include allegations of a smaller conspiracy within a larger conspiracy. The court then said:

"We, therefore, view the (plaintiff's) complaint as stating a separate and distinct cause of action against A.T.&T. and Western Electric for restraining trade in and monopolizing the public communications industry by means which included cross-patent licensing agreements with R.C.A., G.E. and Westinghouse, and an agreement between A.T.&.T. and Western Electric whereby the latter would supply all of the telephone equipment needed by A.T.&.T. . . .

"Recognizing the above allegations as stating a separate claim for relief against A.T.&.T. and

> Western Electric, there can be little doubt that the Government suit in question did in fact toll the statute as to such a separate claim. It is virtually identical with the matter complained of in the Government suit." (186 F. Supp. at 160.)

The allegations of plaintiff's complaint in the *Philco* case may have been "virtually identical" with the allegations of the Government complaint, but it is clear that they were allegations of violations of the antitrust laws, and not of specific acts by which those violations injured the plaintiff.

In conclusion it may be said that the *Steiner* case has received no more support in subsequent cases than it found in the law as it stood when *Steiner* was decided. It is in conflict with decisions of the Seventh and Tenth Circuits. The opinion of the Court below once again applies the *Steiner* tests. As such, the opinion of the Court below continues the conflict in the Circuits and perpetuates the erroneous *Steiner* doctrine.

Dated: Los Angeles, California, July 30, 1964.

Respectfully submitted,

RICHARD G. HARRIS,
Attorney for Petitioners.

Of Counsel:
MAXWELL KEITH.

APPENDIX A.

Opinion of United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Marc D. Leh, individually and The Progress Company, a co-partnership comprised of Marc D. Leh and David Brown, co-partners, Appellants, vs. General Petroleum Corporation, a corporation, Standard Oil Company of California, a corporation, Texaco, Inc., a corporation, Richfield Oil Corporation, a corporation, Union Oil Company of California, a corporation, Tidewater Oil Company, a corporation, Appellees. No. 18,333.

[April 2, 1964]

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes and Jertberg, Circuit Judges; and Burke, District Judge.

Barnes, Circuit Judge:

This is an appeal from a judgment of dismissal below, upon the sole ground the statute of limitations had run against The Progress Company on its cause of action against appellees, filed September 28, 1956. The action was for treble damages under Section 4 of the Clayton Act (15 U.S.C. § 15), arising from the alleged violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2). Jurisdiction below rested on Sections 1337 of Title 28, United States Code, and rests here on Sections 1291 and 1294(1) of Title 28, United States Code.

It is conceded by appellant that its cause of action accrued no later than February 1954, and that the applicable statute of limitations began to run at that time. The question before us is *first:* What is the applicable statute of limitations? And, *second:* Whether (if the one year statute Cal. Code Civ. P. § 340(1) is applicable, rather than the three year statute Cal. Code Civ. P. § 338(1)) was tolled or suspended under § 5 of the Clayton Act (15 U.S.C. § 16, as amended, 15 U.S.C. § 16(b), 1955) by a similar proceeding "instituted by the United States."

The alleged similar proceeding was *United States v. Standard Oil Co., et al.,* Civil No. 11584-C, heretofore pending in the United States District Court for the Southern District of California (the same district from which this case arose, although the cases were assigned to and tried by different judges).

Seven specifications of error raise the above primary questions. They need not here be quoted in full. The appellees likewise raise two separate defenses,[1] which need not here be considered in view of our subsequent primary conclusions.

It is further conceded by both parties that the four year federal limitations period with respect to private causes of action under the antitrust laws is inapplicable to a cause accruing in 1954; and that resort must

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[1]II This Action Cannot Be Maintained Because It Was Not In Fact Filed by the Purported Plaintiff, The Progress Company.

"III The Undisputed Facts Show That The Progress Company Did Not Suffer Any Actionable Damage By Any Act of Appellees."

be had to state law. (*Steiner v. 20th Century-Fox Film Corp.*, 9 Cir. 1956, 232 F.2d 190, 194.[2]

The difficulty with the "solution" of "looking to state laws" is that there the problem starts.[3]

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[2]Amici Curiae lodged with the Clerk of this Court after the oral argument herein a motion for leave to file a brief. That motion was denied, but the amici parties cited with the motion are here mentioned. Amici differ with the agreed position taken by both parties to this appeal, that resort must be had to state law for the "characterization" of the cause of action created by 15 U.S.C. § 15. Cited are *Smith v. Cremins*, 9 Cir. 1962, 308 F.2d 187, and *Simler v. Connor*, 1963, 372 U.S. 221.

The first case involves civil rights (42 U.S.C. § 1983) and the action is upon a liability created by statute, "different from any which would exist at common law in the absence of statute" (p. 190). But no "penalty or forfeiture" exclusion is involved in *Smith v. Cremins*, or discussed therein.

Simler v. Connor, supra, involves in a diversity case, in a suit for attorneys' fees, the question whether state or federal law controls as to whether the plaintiff was entitled to a jury trial.

We see no controlling force in either of these opinions with respect to the issues presented in this case.

[3](a) "Since the antitrust laws specify no statute of limitations for private damage actions, courts look to state law. This approach, however, has produced more questions than answers." (The Report of The Attorney General's Committee to Study the Antitrust Laws, p. 381 (1955).)

(b) "In the federal statute of limitations, the allied tolling provisions, and other important provisions in the statutory scheme, there are critical terms and phrases which require more precise definition than Congress has seen fit to provide. The courts have attempted to provide the needed definitions, but these judicial elabora-

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This action is one where much can be said on both sides. Where a strong diversity of judicial opinion exists, and we attempt to prognosticate (as all other federal courts must who face the problem) the result at which a state court would arrive, we find many gray areas. Are we to consider what our opinion might be, based on an original solution of the problem, or are we to consider the trial court's conclusion and opinion, and determine only whether it is clearly erroneous? We conclude the latter is the proper measuring stick, and under it, after some soul searching, we affirm the district court. We are reminded of what Judge Wyzanski said so frankly to a jury in a private treble damage antitrust action (*Cape Cod Food Products v. National Cranberry Association,* D.Mass. 1954, 119 F.Supp. 900, 910) speaking of damages, "You can't go to a book and look for the answer."

The California Code of Civil Procedure §§ 335 and 338(1) read as follows (in pertinent part):

> "§ 335. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows * * *
>
> § 338. * * *
>
> Within three years:
>
> 1. An action upon a liability created by statute, other than a penalty or forfeiture."

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tions are as often confusing and contradictory as they are helpful." (Wiprud, G.W., "Antitrust Treble Damage Suits Against Electrical Manufacturers: The Statute of Limitations and Other Hurdles." 57 Northwestern Univ. L. Rev. 29 (1962).)

California Code of Civil Procedure § 340(1) reads as follows (in pertinent part):

> "§ 340. * * *
>
> Within one year:
>
> 1. Statutory penalty or forfeiture. An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the State, except when the statute imposing it prescribes a different limitation; * * *"

Is the action based upon a statutory penalty or forfeiture, or is it an action based upon a liability created by statute other than a penalty or forfeiture?[4]

In considering this question, it is our problem, as it was that of the court below, to determine not what we would rule were it a case of first impression before us, but which of said statutes a California court would apply if it had jurisdiction of this case. *Hall v. Copco Pacific, Ltd.*, 9 Cir. 1955, 224 F.2d 884.

Appellants have five prongs to their spear in their attack on the one year penal statute interpretation. We discuss each of appellants' contentions in turn.

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[4]This court has stated in so many words, "An action to recover damages resulting from a violation of the Sherman Anti-trust Act is not an action to recover a penalty." *Hicks v. Bekins Moving and Storage Co.*, 9 Cir. 1937, 87 F.2d 583, relying solely on *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 1906, 203 U.S. 390, 397. *Chattanooga* is mentioned later, in the quotation of Judge Mathes' opinion below. The only two cases cited in *Chattanooga* to support the court's conclusion are: *Huntington v. Attrill*, 1892, 156 U.S. 657, 658, and *Brady v. Daly*, 1899, 175 U.S. 148, 155, 156. These are also cited in Judge Mathes' memorandum decision. And see note 7, *infra*.

(A) Appellants suggest that "at least one California trial court has construed the action as compensatory rather than penal." This decision is unreported, but what purports to be a certified copy of a "Memorandum and Order on Demurrers and Motions to Strike" is attached to appellants' opening brief as an appendix. It is from the Superior Court of the State of California in and for the County of Fresno, No. 97179, and is entitled "Charles S. Ehrhorn, d.b.a. Navy Gas Co., Plaintiff, vs. Caminol Company, et al, Defendants."

The trial judge in *Ehrhorn v. Caminol Co., supra,* first sustains certain general and special demurrers, and grants leave to amend. He likewise states: "The Court is of the opinion that the three year statute of limitations applies." This is a state action based on the Cartwright Act, a state antitrust statute. No reasons are given for the holding; and no authority is cited. We do not know what the precise issue was, raised by the pleadings then before the trial judge, or whether he was merely delivering "an advisory opinion" to aid counsel for plaintiffs therein in drafting his required new complaint. We think it of some, but little precedential value.

We adopt in this connection a portion of appellees' argument, appearing in their opening brief:

> "[A] decision of the Superior Court at an intermediate stage of the case is binding on one, *Stevens v. Key-Resistor Corp.* (1960) 186 C.A. 2d 325, 8 Cal. Rptr. 908; *Carley v. City of Santa Rosa* (1957) 154 C.A. 2d 214, 315 P.2d 905; *Curnutt v. Holk* (1962) 203 A.C.A. 6 [203 C.A. 2d 6, 21 Cal. Rptr. 224]; *Phillips v. Phillips* (1953) 41 Cal. 2d 869, 874, 264 P.2d 926; *Grable*

v. Citizens Nat. Trust & Sav. Bank (1958) 164 C.A. 2d 710, 331 P.2d 103, and even a final decision is not binding on any other superior court. *People v. Cowles* (1956) 142 C.A. 2d 865 298 P. 2d 732; see generally *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456, 369 P.2d 937. Superior Court opinions are rarely reported in California and there is no digest of points decided in such opinions. It is precisely for this reason that *King v. Order of Travelers* (1948) 333 U.S. 153, 161-162, held that state trial court decisions need not be regarded by federal courts in diversity actions as declaratory of state law. Otherwise a plaintiff might secure a fortuitous victory in a federal court by virtue of an authority that would not be recognized in the state courts and might be contrary to many other such unreported cases.

Upon the basis of its own through knowledge of the nature of California Superior Courts, this Court in *State of California v. Fred S. Renauld & Co.*, 179 F.2d 605 (9 Cir. 1950) with careful analysis rejected an argument that a decision of a Superior Court is binding on the United States Court of Appeals, saying (179 F.2d at 609).

> 'federal courts are bound (a) when the supreme judicial tribunal of the state has decided a given question, or (b) a state appellate court which is in the line of the state appellate structure leading up to the supreme tribunal of the state has decided, it, or (c) a *goodly number of the trial courts of the state generally and for a considerable period of time have adhered to a common*

interpretation of the point. Niether of the cited California decisions is binding on any other court of the state excepting only that the Superior Court Appellate Department decisions may be said to be binding on other Municipal Courts of the county in which the decision was had.

'It is our opinion that neither of the California cases cited falls within either of the categories mentioned and neither, nor both of them together, bind the federal court.'" (Emphasis appellees'.)

In *Reid v. Doubleday & Co.,* N.D. Ohio 1952, 109 F.Supp. 354, Judge Kloeb, a trial judge experienced in antitrust litigation, held that treble damages awarded under the Robinson-Patman Act were remedial rather than penal, and in doing so, considered whether a federal court, in determining what state law is or is to be, and eliminating "other persuasive evidence," must follow (a) the Supreme Court of that state; (b) an intermediate appellate court; (c) lower state courts of original jurisdiction. He stated the answers are to (a) "Yes." *Erie Railroad Co. v. Tompkins,* 1938, 304 U.S. 64; to (b) "Yes." *King v. Order of United Commercial Travelers of America,* 1948, 333 U.S. 153; *Six Companies v. Highway District,* 1940, 311 U.S. 180, *reh. den.* 311 U.S. 730; *Fidelity Union Trust Co. v. Field,* 1940, 311 U.S. 169, *reh. den.* 311 U.S. 730; to (c) "Yes and no." *King v. Order of United Commercial Travelers of America, supra,* at 159. The federal courts, he concludes, may or may not follow the lower state courts, as they think proper.

In deciding the matter, Judge Kloeb relied on many of the cases later cited and discussed herein (p. 363).

(B) Turning to the cases which appellants list as recognizing the three year statute, we find the following listed: *Burnham Chemical Co. v. Borax Consolidated,* 9 Cir., 1948, 170 F.2d 569, 578, *cert. den.* 336 U.S. 924, *reh. den.* 336 U.S. 955; *Suckow Borax Mines Consol. v. Borax Consolidated,* 9 Cir. 1950, 185 F.2d 196, 207; *cert. den.* 340 U.S. 943, *reh. den.* 341 U.S. 912; *Steiner v. 20th Century-Fox Film Corp. supra.* (In the last two cases cited the authority is dimmed somewhat by the fact the parties agreed that the three year statute applied.) Four district court decisions are then listed—two each from Northern and Southern California: *Aero Sales Co. v. Columbia Steel Co.,* N.D. Cal. 1954, 119 F.Supp. 693; *Manny v. Warner Bros. Pictures,* S.D. Cal. 1953, 116 F.Supp. 807; *Levy v. Paramount Pictures,* N.D. Cal. 1952, 104 F.Supp. 787; *United West Coast Theatres Corp. v. South Side Theatres,* S.D. Cal. 1949, 86 F.Supp. 109.

In the *Burnham Chemical Co.* case, *supra,* a reading indicates that this court stated (at p. 578): "The [trial] court *therefore* properly held the cause barred by Section 338(1) of the California statute of limitations." (Emphasis added.) The "therefore" refers to the fact that "the only damages for which a recovery might be had (under federal antitrust laws) are those which accrued and were suffered within three years prior to the filing of the complaint and the record reveals that none were shown during this period." Obviously if no damages could be shown during a three year period immediately prior to the filing of the complaint, none could be shown during the one year period prior to the filing of the complaint; hence no choice between the two periods was offered the court, nor

any choice between the two periods necessary or required.

Thus a reading of *Burnham, supra, Suckow Borax Mines, supra,* and *Steiner v. Twentieth Century Fox, supra,* indicates that in none of these has the precise issue here present been met. In the first it was not necessary because of the facts; in the last two, the three year statute was agreed upon by the parties as applicable.[5]

In *Aero Sales Co. v. Columbia Steel Co.,* N.D. Cal. 1954, 119 F.Supp. 693, Judge Harris held that Judge Goodman, in *Wolfe v. National Lead Co.,*[6] had already decided the question that the treble damage provision of the Clayton Act was not penal, hence the three year statute prevailed, and that Judge Harris concurred despite "persuasive arguments" in favor of the one year penalty theory. Judge Harris also referred to the *United West Coast Theatres (supra)* opinion which was written by Judge Mathes (the same judge who came to the opposite conclusion in our instant case). Judge Harris discussed and differentiated *Ben C. Jones & Co. v. West Publishing Co.,* 5 Cir. 1921, 270 Fed. 563, dismissed, 270 U.S. 665, upon two grounds—(1) it had not been followed, either in the courts of Texas nor in the federal courts sitting in that state, and (2) that in the *Jones* case, the four year statute was an effective bar, without a consideration or discussion as to whether the two year Texas

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[5]185 F.2d at 207 and 232 F.2d at 194, respectively.

[6]No. 29500, unreported, in the District Court for the Northern District of California.

statute prevailed, as the action was barred by either statute of limitations.

In *Manny v. Warner Bros., supra,* Judge Westover specifically noted:

> "[I]t is immaterial whether the plea of the statute of limitations is under the provisions of subdivision 1 of § 340 or subdivision 1 of § 338 of the Code of Civil Procedure of the State of California. If the contention of moving defendants is correct . . . then the cause of action is barred by both sections." (116 F.Supp. at 808-809.)

In *Levy v. Paramount Pictures, supra,* Judge Carter assumed the three year statute applied, without the necessity of determining whether the one year statute was applicable.

In *United West Coast Theatres Corp. v. South Side Theatres, supra,* Judge Mathes, after reciting that the California courts had not decided the point (86 F.Supp. at 110), ruled:

> ". . . the nature of the remedies accorded a private person . . . would seem to mark the liability as one 'created by statute, other than a penalty or forfeiture' . . ." (the language used in § 338(1).)

Judge Mathes then cites *Fleitmann v. Welsbach Street Lighting Co.,* 1916, 240 U.S. 27, 29; *United Copper Securities Co. v. Amalgamated Copper Co.,* 1917, 244 U.S. 261, and relies upon *Burnham Chemical, supra,* already discussed as a ninth circuit case supporting his position, and refers to *Foster & Kleiser v. Special Site Sign Co.,* 9 Cir. 1936, 85 F.2d 742, 751-

753, *cert. den.* 299 U.S. 613; *Culver v. Bell & Loffland*, 9 Cir. 1944, 146 F.2d 29, 31, and states:

> "[T]his action having been commenced more than six years . . . after . . . [each claim for damages had accrued] the counterlcaim is long barred by § 338(1) of the California Code of Civil Procedure, unless . . . tolled."

In reversing his position in his re-examination of the problem in this case, Judge Mathes gave it careful study. He states in his memorandum of decision filed August 30, 1962 (to be considered as his Findings and Conclusions, Tr. p. 1226):

> "The correct method whereby to determine which State statute of limitations is properly applicable to a cause arising under the antitrust laws prior to the Federal limitations statute has been the subject of some judicial disagreement. One view is that, inasmuch as the private antitrust action involves a Federal cause of action, whatever State limitations period is to be applied turns upon the Federal court's view as to the nature of the Federal action, as being either 'remedial' or 'penal'. *Cf.: Fulton v. Loew's Inc.*, 114 F. Supp. 676, 682 (D. Kan. 1953); *Christensen v. Paramount Pictures*, 95 F.Supp. 446, 449 (D. Utah 1950); see also *Momand v. Universal Film Exchange*, 43 F. Supp. 996, 1008-1009 (D. Mass. 1942).] And since the Court concluded in the *Chattanooga Foundry* case, *supra*, 203 U.S. 390,[7] that action

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[7]Concerning *Chattanooga, supra,* the second circuit distinguished it in these words:

> "Considered in the light of these principles, the Supreme Court's decision in Chattanooga Foundry

for treble damages under the Federal antitrust laws are not subject to the general Federal statute of limitations governing actions to recover a 'penalty' under the laws of the United States [28 U.S.C. § 791, as amended, *id.* § 2462 (1948)], it has been reasoned that a State limitations statute dealing with recovery of 'penalties' in the State courts cannot in any event be applied to treble-damage claims grounded upon Federal antitrust violations. [See: *Greene v. Lam Amusement Co.*, 145 F.Supp. 346, 348 (N.D. Ga. 1956); *Wolf Sales Co. v. Rudolph Wurlitzer Co.*, 105 F.Supp. 506, 509 (D. Colo. 1952).]

& Pipe Works v. City of Atlanta, 203 U.S. 390, 27 S.Ct. 65, 66, 51 L.Ed. 241, is not decisive of this case. There the Supreme Court held that an action for treble damages under the anti-trust laws was not an action for a penalty within the meaning of the federal statute of limitations for penal suits [note]. But the word 'penalty' in a federal statute has a different meaning than the same word in the New York statute. The federal statute of limitations for penal actions applies only to actions on behalf of the United States and *qui tam* actions. Huntington v. Attrill, 146 U.S. 657, 668, 673, 13 S.Ct. 224, 36 L.Ed. 1123. The New York statute by its express terms applies to actions 'by the person aggrieved' and thus, unlike the federal statute, applies to private actions. Huntington v. Attrill, supra, 146 U.S. 677-678, 13 S.Ct. 231." (*Bertha Building Corp. v. National Theatres Corp.*, 269 F.2d 785 at 788-789.)

And *cf. Englander Motors, Inc. v. Ford Motor Co.*, 6 Cir. 1961, 293 F.2d 802; *Norman Tobacco & Candy Co. v. Gillette Safety Razor Co.*, N.D. Ala. 1960, 197 F. Supp. 333, *affirmed*, 5 Cir. 1961, 295 F.2d 362.

"The majority view, however, as formulated in recent years, holds that the question of limitations applicable to private antitrust actions was, as Mr. Justice Holmes put it, 'left to the local law by the silence of the Statutes of the United States'. [*Chattanooga Founday & Pipe Works v. Atlanta, supra,* 203 U.S. at 397.] Moreover, the word 'penalty', as applied in a Federal statute such as 28 U.S.C. § 2462, obviously may have 'a different meaning than the same word in the . . . [State] statute'. [*Bertha Building Corp. v. National Theatres Corp.,* 269 F.2d 785, 788 (2 Cir. 1959); *cert. denied,* 361 U.S. 960 (1960).] Accordingly, in keeping with the principle that statutory construction by a State's highest court is deemed an integral part of the text of the State's statute of limitations, it has been declared that Federal courts 'must accept the statutes as construed and interpreted by the . . . [State] courts. It is for them to determine what is meant by the word "penalty" in the . . . [State] statute'. [*Bertha Building Corp. v. National Theatres Corp., supra,* 269 F.2d 785-788 (2d Cir. 1959), *cert. denied,* 361 U.S. 960 (1960); *cf.: Moore v. Illinois Central R. Co.,* 312 U.S. 630, 634 (1941); *Costello v. Bank of America,* 246 F.2d 807, 812 (9th Cir. 1957).]

"Adherence to the rationale just stated has required the Federal courts to compare the nature of the Federal treble-damage antitrust action with that of analogous State causes, as construed by the courts of the particular State involved, and from such a comparison to decide which local statute of

limitations the courts of the State would deem applicable to actions embracing Federal treble-damage antitrust claims. [See: *North Carolina Theatres, Inc. v. Thompson,* 277 F.2d 673 (4th Cir. 1960); *Powell v. St. Louis Dairy Co.,* 276 F.2d 464 (8th Cir. 1960); *Bertha Building Corp. v. National Theatres Corp., supra,* 269 F.2d 785; *Gordon v. Loew's Inc.,* 247 F.2d 451 (3rd Cir. 1957); *Green v. Wilkinson,* 234 F.2d 120 (5th Cir. 1956); *Hoskins Coal & Dock Corp. v. Truax Traer Coal Co.,* 191 F.2d 912 (7th Cir. 1951); *cert denied,* 342 U.S. 947 (1952); *Leonia Amusement Corp. v. Loew's Inc.,* 117 F.Supp. 747 (S.D. N.Y. 1953); *and see: Cope v. Anderson,* 331 U.S. 461 (1947); *Englander Motors, Inc. v. Ford Motor Co.,* 293 F.2d 802, 806 (6th Cir. 1961); *Momand v. Universal Film Exchanges,* 172 F.2d 37, 47 (1st Cir. 1948); *cert. denied,* 336 U.S. 967 (1949); *United Banana Co. v. United Fruit Co.,* 172 F.Supp. 580, 585 (D. Conn. 1959); *compare: Brady v. Daly,* 175 U.S. 148 (1899); *Huntington v. Attrill,* 146 U.S. 657 (1892).]

"A study of the decisions convinces me that the precedent of seeking guidance from the construction given a particular limitations statute by State courts is a sound one to follow in the case at bar, notwithstanding the inherent difficulty of diverse judicial interpretations in the various States as to the essential nature of private multiple-damage actions. [See : *North Carolina Theatres, Inc. v. Thompson, supra,* 277 F.2d 673; *Bertha Building Corp. v. National Theatres Corp., supra,* 269 F.2d 785; *Englander Motors, Inc. v. Ford Motor Co.,*

186 F.Supp. 82, 90 (N.D. Ohio 1960), *modified on other grounds,* 293 F.2d 802 (6th Cir. 1961).]

"Turning, then, to the scope of the three-year [Cal. C.C.P. § 338(1)] and the one-year [Cal. C.C.P. § 340(1)] statutes in question here, as construed by the State courts, it is noted that although the California courts have not as yet interpreted for limitations purposes a similar private-action provision under the State's antitrust law [see Cal. Bus. & Prof. C. § 16750, as amended, *id.* § 16750 (a) (1959)], they have considered the applicability of both § 338(1) and § 340(1) on several occasions in cases involving circumstances closely analogous to those presented at bar. For example, a statutory provision for recovery of twice the amount paid to a decedent in excess of legally-incurred payments under the State Old Age Security Law has been characteciced as 'penal,' and hence the one-year period of limitation specified in § 340 (1) was held applicable. [*Department of Social Welfare v. Stauffer,* 56 C.A. 2d 699, 133 P.2d 692 (1943).]

"The same result was reached where 'liquidated damages' were imposed by statute for failure of gas and electric companies to supply requisite power [*Hansen v. Vallejo Electric Light & Power Co.,* 182 Cal. 492, 188 P. 999 (1920); *compare Los Angeles County v. Ballerino,* 99 Cal. 593, 32 P. 581 (1893)]; where court reporter fees were reduced for failure to comply with court rules [*County of San Diego v. Milotz,* 46 C. 2d 761, 300 P.2d 1 (1956)]; and where a buyer sued for return of the amount paid under a conditional sale contract upon

the seller's interference with payment of the balance of the debt prior to maturity [*Stone v. James,* 142 C.A. 2d 738, 299 P.2d 305 (1956)].

"The California courts have also characterized as 'penal' a statutory provision for double damages in trespass actions involving timber [*Helm v. Bollman,* 176 C.A. 2d 838, 1 Cal. Rptr. 723 (1959); *cf. Swall v. Anderson,* 60 C.A.2d 825, 141 P.2d 912 (1943)]; likewise a statutory provision for treble damages in actions for unlawful detainer [see: *Hoban v. Ryan,* 130 Cal. 96, 62 P. 296 (1900); *Gwinn v. Goldman,* 57 C.A.2d 393, 134 P.2d 915 (1943)], as well as for damages to adjacent property caused by fire [*Clark v. San Francisco & S. J. Val. Ry. Co.,* 142 Cal. 614, 76 P. 507 (1904); see also *Esposti v. Rivers Bros.,* 207 Cal. 570, 279 P. 423 (1929)].

"While there has been no such concurrence of views as to the proper characterization of Federal treble-damage anti-trust actions [see: *Schiffman Bros. v. Texas Co.,* 196 F.2d 695, 697 (7th Cir. 1952); *Leonia Amusement Corp. v. Loew's Inc., supra,* 117 F.Supp. at 756; *and see Loevinger, Private Action—The Strongest Pillar of Antitrust,* 3 Antitrust Bull. 167 (1958)], it is reasonable to characterize such actions as compensatory in part, and as exemplary or penal with respect to the trebling of damages to business or property resulting from antitrust violations [see *Lyons v. Westinghouse Electric Corp.,* 222 F.2d 184, 189 (2nd Cir.), *cert. denied,* 350 U.S. 825 (1955); *cf. Karseal Corp. v. Richfield Oil Corp.,* 221 F.2d 358, 365 (9th Cir. 1955)].

"Moreover, the California Supreme Court has characterized as a penalty 'any law compelling a defendant to pay a plaintiff other than what is necessary to compensate him for a legal damage done him by the former.' [*Miller v. Municipal Court,* 22 C.2d 818, 837, 142 P.2d 297, 308 (1943); see also *Grossblatt v. Wright,* 108 C.A. 2d 475, 239 P. 2d 19 (1951)].

"The conclusion is thus impelled that § 340(1) of the California Code of Civil Procedure, as construed by the California courts, is applicable to treble-damage causes under the Federal antitrust laws which accrued prior to the effective date of the four-year Federal limitations period. [15 U.S.C. § 15b.] Inasmuch as plaintiffs' cause of action admittedly occurred in February 1, 1954, and this action was not commenced until September of 1956, application of the one-year period specified in §340(1) would clearly raise the time bar upon which defendants rely for summary judgment of dismissal. * * *"

The trial judge then turned to the ninth circuit cases hereinbefore mentioned, and the previous district court decisions from this circuit, *supra,* and concluded:

"Treating the question as *res integra,* as I now deem it to be, and having due regard for State-court interpretation of the content of the provisions of both § 338(1) and § 340(1), I must hold that the one-year period specified in Cal. C.C.P. § 340 (1) is the California statute of limitations properly applicable to Federal treble-damage antitrust causes accruing prior to the effective date of the Federal four-year statute. [15 U.S.C. § 15b.]"

We have examined the cases cited in the trial court's memorandum, and we believe they, and his reasoning based thereon, carry conviction. *Cf: Isom v. Rex Crude Oil Co.,* 140 Cal. 678, 680, 74 Pac. 294 (1903) and *Penziner v. West American Finance Co.,* 10 Cal.2d 160, 170, 74 Pac. 252 (1937), and our brief discussion of the penalty theory lying behind treble recovery in antitrust litigation in *Flintkote Co. v. Lysfjord,* 1957, 246 F.2d 368, 398, *cert. denied,* 355 U.S. 835.

While appellees cite cases from six other state jurisdictions supporting their position, we do not feel that the manner in which other state courts interpret their particular statutes would foretell what the California courts might do, absent an almost unanimous rule in other states. Such unanimity of opinion in other states does not exist. We agree with appellants (Reply Brief, p. 6):

> "Everyone concedes that the problem is how a California court would characterize this action under the language of the two specific California statutes. If that is the problem, of what assistance is it to know how a New Jersey Court characterized a private antitrust action under different language in different statutes as interpretated (sic) by different decisions."

We realize that Judge Murphy in *McLean v. Paramount Pictures, Inc.,* No. 30262, ... F.Supp. ..... (in proceedings had on January 10, 1958), held the three year statute applicable, stating:

> "[T]he Ninth Circuit has never squarely passed upon this issue. However, for almost ten years

now the Ninth Circuit has assumed that the three year period of Section 338(1) is the applicable statute."[8]

He cited the cases we have discussed above, his former opinion in *Samuel Goldwyn Prod. v. Fox West Coast Theatres Corp.*, N.D. Cal. 1956, 146 F.Supp. 905, and *Christensen v. Paramount Pictures*, D. Utah 1950, 95 F.Supp. 446, 449.

In *Goldwyn*, it was said:

> "The applicability of the three year statute of limitations of Cal. Code of Civil Procedure § 338(1) . . . to this proceeding is not in issue on this motion, and may be assumed for the purposes of this motion [involving its tolling] to be undisputed." (146 F.Supp. at 906.)

In *Christensen, supra*, Judge Ritter said:

> "On the other hand, counsel for plaintiff contend that the Utah statute of limitations for 'An action upon a statute for a penalty or forfeiture where the action is given to an individual * * *' does not apply to actions for treble damages under the Sherman and Clayton Anti-Trust Acts.
>
> It is my judgment that the Utah statute of limitations, when it speaks of an action upon a statute for 'a penalty or forfeiture where the action is given to an individual, or to an individual and the

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[8]This is copied from Reporter's Transcript of Pre-Trial Hearing in Chambers, held January 10, 1958, in "Daniel O. McLean, et al. v. Paramount Pictures, Inc., et al.," United States District Court (No. 30,262) for the Northern District of California, Southern Division, pp. 25-26.

> state,' refers to actions to enforce the criminal law, in the nature of the well-known informers actions. The language of this statute is not modern. It has been in the Anglo-American statutory law for a long time and I very seriously doubt that the legislative history of this provision would justify its application to suits for treble damages under the Sherman Anti-Trust and Clayton Acts." (95 F. Supp. at 449.)[9]

(C) Appellants also make limited reference to the 1914 Congressional Record; and the 1950 Congressional Record listing of the State of California as having a three year statute (96 Cong. Rec. 10439-41 (1950)).

We note that Senator Hoar, the author (or at least the person in charge of the bill in the Senate) referred to the three-fold damage provision as "establishing a *penalty . . . purely penal and punitive.*" (Emphasis added. 21 Cong. Rec. 3146-47 (1890).)

(D) Heavy emphasis is placed by appellants on a law review article authored by Professor Lawrence Vold, appearing in 28 Kan. L.Rev. 117, particularly 152-159 (1940), entitled: "Are Threefold Damages Under the Anti-Trust Act Penal or Compensatory?" Starting with II Samuel (Chapter 12, Verses 1-6), he represents that the criminal punishment (death) therein decreed was alone "penal," that the "lamb restored fourfold"

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[9]There then appears note 8 in the *Christensen* case, referring to *Huntington v. Attrill*, 146 U.S. 657 (vide post) and the reference therein to Lord Watson's statements (vis-a-vis those of Master of the Rolls Lindley in *Shelton Elec. Co. v. Victor Talking Machine Co.*, D.C. N.J. 1922, 277 Fed. 433, 435-436) giving the legislative history of the English statute of limitations.

was "reparation" to the injured party, and nothing more. We agree with Professor Vold when he states "the available terminology relating to damages and penalties is very slippery language." He buttresses his argument by suggesting that the "defendant" both in the Bible and in antitrust litigation is a "rich and powerful wrongdoer," while the plaintiff is "a very poor man, who has but his own little business to which he devotes his life" (p. 120), that there are "intangible elements to which no definite measure in pecuniary loss can readily be applied" (p. 124)—these he groups and describes as "accumulative harm" (p. 125). Professor Vold disagrees, for example, with Judge Runyon in his opinion in *Haskell v. Perkins,* D.C.N.J. 1928, 28 F.2d 222, *reversed on other grounds,* 31 F.2d 53, wherein that court stated (with considerable logic):

> "[B]ut if, on the other hand, the damages as awarded by the jury constitute in their entirety everything that is compensatory, then the trebling of the damages and the [additional] attorneys' fee would appear to lie entirely outside the scope of compensation. . . ."

"Consequently," says Professor Vold,

> "the reasoning [of Judge Runyon] utterly ignores the element of liquidating compensation for accumulative actual harm in the intangible elements involved when a going business is destroyed in violation of the anti-trust act. The opinion thus merely blindly assumes that the threefold damage provision is merely punitive." (p. 151)

Judge Runyon's conclusion appears to us to be correct, unless we assume that "unprovable" compensation in excess of full provable compensation can be some-

thing other than punitive damages. If it cannot be compensation, and cannot be punitive, then what is it? Because "accumulative harm" is difficult or impossible of proof, says the Professor, some or all of whatever damages are awarded beyond provable compensation must be classified as compensatory damages and not penal. We think one purpose of a "penalty" in the antitrust statutes is to award damages for losses that are either difficult of proof, or cannot be precisely ascertained (and hence are incapable of proof as compensatory damages), as well as to discourage the anticompetitive activities which gave rise to the antitrust cause of action. But no matter the reason, the amount awarded over and above compensation is to penalize—to do more than compensate.

This does not mean we need disagree with Professor Vold that "the threefold damage provision as used in the federal anti-trust act is not a provision for a penalty, *using that term in the strict sense of a payment exacted and collected by the state as a punishment by way of example to deter other evildoers.*" (P. 158; emphasis added.)[10] Punishment and deterring effect is certainly part of its purpose, but it may well have a second purpose; that of awarding damages beyond those compensable damages capable of proof.

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[10]"An analysis of the statutory provisions upon which the plaintiffs sue [15 U.S.C. § 15] clearly indicates that the actual loss sustained by plaintiffs is only a base upon which the sanction of treble damages is superimposed. Thus, the fundamentally penal character of the right of action is evident." *Banana Distributors v. United Fruit Co.*, S.D. N.Y. 1957, 158 F.Supp. 160 at 163.

The provisions of the statute giving the wronged individual the right to sue prevent the word "penalty" from being defined in such a strict sense as the law review article states. The statute is, as has been said, *"sui generis." Imperial Film Exch. v. General Film Co.,* S.D. N.Y. 1915, 244 Fed. 985, 987. Congress theorized that useful social purpose could be accomplished if private individuals or companies can and will aid their government in enforcing antitrust laws. To do this they require encouragement that the private litigant may recover *more* than his or its actual compensatory damages.[11] What is recovered under Section 7 of the Sherman Act (15 U.S.C. § 15) is no less a penalty on the wrongdoer than is the fine and imprisonment with which the sovereign can threaten the violator under Sections 1 and 2, or the forfeiture of articles transported in commerce, as provided for in Section 6. (15 U.S.C. § 6.) The treble damage provision cannot be classified as exemplary damages, in the ordinary legal sense of that phrase, for in antitrust the jury has no authority or discretion to decline to award, or as to how much to award, once the compensatory amount of damages is determined. But we insist it has some attributes of a penal statute.

We conclude Professor Vold suggests an interesting legal theory, *i.e.,* that the courts should recognize that antitrust treble damages awards are made up of two sums, one compensatory for actual damage, and the second compensatory for accumulative intangible unprovable harm, requiring recognition that the total of the treble damages awarded was compensatory, and not pe-

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[11]See Note, 75 Harvard Law Review 627 (1962).

nal. But we think this emphasizes but one of the peculiar reasons underlying the adoption of our antitrust laws, and is not the sole reason underlying the provision for treble damages. Such special, select (and perhaps deserved) interpretation must, in our opinion, await legislative action, rather than be created by judicial enactment.

(E) Finally, appellants cite federal cases from other jurisdictions where the courts have allegedly "impliedly agreed" that the private antitrust action is compensatory or remedial, rather than penal in nature; citing: *Bertha Building Corp. v. National Theatres, Corp.*, 2 Cir. 1959, 269 F.2d 785, 789, *cert. denied* 361 U.S. 960; *Fulton v. Loews, Inc.*, D.Kan. 1953, 114 F.Supp. 676, 680; *Christensen v. Paramount Pictures*, D. Utah 1950, 95 F.Supp. 446.

In *Bertha Building Corp. v. National Theatres, Corp., supra*, the court of appeals, Judge Swan writing the opinion, considered the general rules hereinbefore enunciated, and pointed out that Judge Ryan, of the District Court for the Southern District of New York, had held the six year New York statute (§ 48, Subdivision 2, New York Civil Practice Act) applicable; not the three year (§ 49, Subdivision 3 of the New York Civil Practice Act); for the latter was not applicable "to private suits for damages which are exemplary in part but not wholly unrelated to actual loss." (269 F.2d at 789.) (This was a reference to the opinion in *Leonia Amusement Corp. v. Loews Inc., supra*, at 752.

Four years later in *Banana Distributors v. United Fruit Co.*, S.D. N.Y. 1957, 158 F.Supp. 160, Judge Levet concluded the shorter three year New York statute

should be applied to an action upon a statute for a penalty or forfeiture.[12]

Judge Swan held, in *Bertha Building, supra,* the New York rule to be that a treble damage action in that state is not an action on a penalty statute—agreeing with Judge Ryan largely based on the persuasive New York Court of Appeals decision by Judge Desmond in *Sicolo v. Prudential Savings Bank of Brooklyn,* N.Y. 1959, 5 N.Y.2d 254, 184 N.Y.S.2d 100, 157 N.E. 2d 284. In that case a fireman sued for damages sustained by him in fighting a fire in defendant's bank building after defendant violated a safety law. "That statute provides in substance that the injured fireman was entitled to recover his actual damages, but in no event less than $1,000, regardless of actual loss." (269 F.2d at 789.) The New York state court ruled the longer statute of limitations was applicable—because it was a liability created by statute, not a penalty or forfeiture.

In *Fulton v. Loews Inc., supra* at 680, the court did, as appellees correctly state, take the "federal" approach —*i.e.,* held that the federal rule as to whether the antitrust laws provided a remedial and compensatory recovery, or a penal recovery, should control over a doubtful state law.

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[12]Judge Levet cites and quotes from *Karseal Corp. v. Richfield Oil Corp.,* 9 Cir. 1955, 221 F.2d 358, 365. *Fanchon & Marco v. Paramount Pictures, Inc.,* S.D. Cal. 1951, 100 F.Supp. 84, 88, *affirmed* 215 F.2d 167, *cert. den.* 345 U.S. 964; *United States v. Standard Ultramarine & Color Co.,* SD. N.Y. 1955, 137 F.Supp. 167; *American Banana Co. v. United Fruit Co.,* S.D. N.Y. 1907, 153 Fed. 943, and many other cases.

Appellees urge and appellants concede (Opening Brief, pp. 4, 13, 22) that no such easy solution is permissible here.

In *Christensen v. Paramount Pictures, supra,* the judge decided the issue largely on the fact "the question has been decided by a federal district court in California and by the 9th Circuit." (*Cf.*: n. 9 thereof, citing *United West Coast Theatres, supra,* and *Burnham Chemical v. Borax Consolidated, supra.*)

In *Lyons v. Westinghouse Electric Corp.,* 2 Cir. 1955, 222 F.2d 184, *cert. denied,* 350 U.S. 825, Judge Learned Hand wrote, in an action for private triple damages under the antitrust laws, "The remedy provided is not solely civil; two thirds of the recovery is not remedial and inevitably presupposes a punitive purpose. It is like a qui tam action, except that the plaintiff keeps all the penalty, instead of sharing it with the sovereign." (*Id.* at 189.) And see Judge Pope's approval of such language, for this court, in *Mach-Tronics, Inc. v. Zirpoli* (9 Cir. 1963), 316 F.2d 820, 831-2.

Judge Levet pointed out in *Banana Distributors v. United Fruit, supra,* that Judge Cardozo, while on the state court, in *Cox v. Lykes Bros.,* 1924, 232 N.Y. 376, 143 N.E. 226 at 227-228, had stated:

> "We are to remember that the same provision may be penal as to the offender and remedial as to the sufferer. Huntington v. Attrill, 146 U.S. 657, 667. . . The nature of the problem will determine whether we are to take one viewpoint or the other."

We have considered the great emphasis placed by appellants on two California cases, interpreting the State Cartwright Act; *Milton v. Hudson Sales Corp.*, 1957, 152 Cal.App.2d 418, 440, 313 P.2d 936, and *Rolley, Inc. v. Merle Norman Cosmetics, Inc.*, 1954, 129 Cal. App.2d 844, 849, 278 P.2d 63. The force of these exclusive dealing cases, say appellants, is that by them we are "simply referred back to the Federal cases." (Reply B., p. 5.) *Rolley* does that in determining the issue of a nonmonopolistic refusal to sell, because it says both the Cartwright Act (California Bus. & Prof. Code §§16600ff) and the Sherman Act, are basically restatements of common law, although the same reasoning does not apply to the Clayton Act. *Milton v. Hudson, supra,* holds: "There is little doubt that cases decided under the Sherman Act and the common law policy against restraint of trade are applicable to problems arising under the Cartwright Act." (*Id.* at 440.) But neither pass upon, nor approach, the statute of limitations question here involved, nor decide whether treble damage provisions (or, under state law Bus. & Prof. Code § 16750, double damage provisions) are penal or remedial.

In the Loevinger article[13] quoted in Judge Mathes' decision below, there is a reference in a concluding note to an article in Northwestern University Law Review, written by a practicing lawyer who has achieved noteworthy success in the prosecution of private antitrust actions.[14] In this article, criticism is made of "The

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[13]Loevinger, L., "Private Action—The Strongest Pillar of Antitrust," 3 Antitrust Bull. 167 (1958).

[14]McConnell, Thos. C., "The Treble Damage Issue: A Strong Dissent," 50 Northwestern University L. Rev. 342 (1955).

Report of the Attorney General's Committee to Study the Antitrust Laws (1955)." The author refers to page 379 of the report, where it is stated:

> "On balance, we favor vesting in the trial judge discretion to impose double or treble damages. *In all instances,* this would *recompense* injured parties. *Beyond compensation,* the trial court could then *penalize* the purposeful violator without imposing the harsh *penalty* of multiple damages on innocent actors." (Emphasis added.)

We are not here concerned with whether treble damages should or should not be permitted in private antitrust actions. Congress has decided they should be. We quote this portion of the report, and note the criticism thereof, not to prove or disprove the thesis it postulates, but to indicate the common acceptance among knowledgeable specialists in antitrust law of a belief that the trebling of damage constitutes a penal statute, and is more than remedial in nature.

The holding made by Judge Mathes, reversing his previous holdings, cannot, we firmly believe, be held clearly erroneous, and we affirm.

II

Nor do we think the trial court erred in holding the statute of limitations was not tolled during the pendency of the action entitled *United States v. Standard Oil Co. of California,* Civil No. 11854-C.

From *Steiner v. 20th Century Fox Film Corp., supra,* this court has already held:

(a) The general rules of collateral estoppel apply. "The tolling provision cannot be extended to matters

which *might* have been but were not complained of by the United States." (232 F.2d at 196.)

(b) What is contained in the two suits is determined by a comparison of the two complaints.

(c) "[T]he matters complained of in the private proceedings must be the same acts to achieve the same conspiracy complained of in the action brought by the United States. . . . The same means must be used to achieve the same objectives of the same conspiracies by the same defendants. . . ."[15] There must be "substantial identity of subject matter."[16]

None of these tests are met. (Compare Tr. pp. 2 to 24 and Tr. pp. 1136 to 1158.) For example, the defendants in the government suit were seven integrated oil companies and the Conservation Committee of California Oil Producers. Neither Shell Oil Company nor the Committee were involved in the instant action. As a second example, the conspiracy in the instant case allegedly started in 1948 and continued into 1954.

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[15]232 F.2d at 196. In this respect, the *Steiner* case and this circuit seem to go further than other circuits in holding that the words of the statute, "any matter complained of," refers to overt acts of the defendants complained of by the United States in its antitrust proceedings, not just the conspiracy behind the overt acts. *Cf.*: 57 Northwestern University L. Rev. 29 at p. 45.

[16]*Union Carbide & Carbon Corp. v. Nisley,* 10 Cir. 1961, 300 F.2d 561, 570, *cert. dism.* under Rule 60, 371 U.S. 801. *Cf.: New Jersey Wood Finishing Co. v. Minnesota Mining & Manufacturing Co.,* D.C. N.J. 1963, 216 F.Supp. 507.

In the government case, the alleged conspiracy commenced in 1936 and was concerned exclusively with events taking place prior to May of 1950. Thus, there were not only different overt acts charged, but different conspiracies, occurring at different times, between different parties.

III

We conclude appellants' action is barred by the statute of limitations; that it was not tolled; and that the judgment below so holding was not clearly erroneous, and is affirmed.

We do not reach the two additional points raised by appellees.

APPENDIX B.

Judgment.

United States Court of Appeals, for the Ninth Circuit.

Marc D. Leh, et al., Appellants, vs. General Petroleum Corp., et al, Appellees. No. 18333.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Div. and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

APPENDIX C.

District Court Opinion.

United States District Court
S. D. California,
Central Division.

Aug. 30, 1962.

Marc D. Leh, individually and the Progress Company, a co-partnership comprised of Marc D. Leh and David Brown, co-partners, Plaintiffs, v. General Petroleum Corporation, a corporation, Standard Oil Company of California, a corporation, Texaco, Inc., a corporation, Richfield Oil Corporation, a corporation, Union Oil Company of California, a corporation, Tidewater Oil Company, a corporation, Defendants. Civ. A. No. 20531-WM.

Mathes, District Judge.

Plaintiffs brought this action for treble damages under § 4 of the Clayton Act [15 U.S.C.A. § 15], alleging injury to their business proximately resulting from a combination or conspiracy among defendants to exclude and prevent plaintiffs from engaging in the wholesale distribution of gasoline in Southern California, in violation of §§ 1 and 2 of the Sherman Act [15 U.S.C.A. §§ 1 and 2]. Federal jurisdiction is invoked under 28 U.S.C. § 1337.

In addition to denying plaintiffs' allegations both as to the alleged tortious conduct and the alleged damage, defendants assert by way of affirmative defense that plaintiffs' action is barred by the applicable State statute of limitations [Fed.R.Civ.P. 8(c), 28 U.S.C.], and now move for a summary judgment of dismissal upon the defense of time bar [Fed.R.Civ.P. 56 (b)].

Plaintiffs allege that a conspiracy was initiated among defendants in 1948 unlawfully to restrain and monopolize interstate commerce in the distribution and sale of refined gasoline, and that defendants then and thereafter combined to exclude plaintiffs as wholesale distributors of this product, both by controlling sales to plaintiffs and by eliminating plaintiffs' sources of supply. All parties agree that plaintiffs' alleged cause of action accrued in February of 1954, and that the applicable State statute of limitations—unless suspended under § 5 of the Clayton Act [15 U.S.C.A. § 16, as amended, id. § 16(b) (1955)] by some similar proceeding "instituted by the United States"—commenced to run at that time [cf.: Steiner v. 20th Century-Fox Film Corp., 232 F.2d 190, 194 (9th Cir. 1956); Suckow Borax Mines Consol. v. Borax Consolidated, 185 F.2d 196, 207-208 (9th Cir. 1950), cert. denied, 340 U.S. 943, 71 S.Ct. 506, 95 L.Ed. 680 (1951)].

It was not until January 7, 1956, that the four-year Federal limitations period with respect to private causes arising under the antitrust laws became effective. [69 Stat. 283 (1955), 15 U.S.C.A. § 15b.] Four years was chosen for the Federal statute, since that period appeared to be "the average limitation for all the 48 States * * *." [See S.Rep. No. 619, 2 U.S.Code Cong. & Adm. News, 84th Cong., 1st Sess., pp. 2331-2332 (1955).]

The Act providing this new Federal statute of limitations declares that: "No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be reviewed by said sections." [15 U.S.C.A. § 15b.]

[1] Inasmuch as the cause at bar admittedly accrued in 1954, resort must be had to the applicable State statute of limitations in order to determine whether plaintiffs' action is "barred under existing law". [See: 28 U.S.C. § 725, as amended, id. § 1652 (1948); Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390, 397, 27 S.Ct. 65, 51 L.Ed. 241 (1906); Campbell v. City of Haverhill, 155 U.S. 610, 618, 15 S.Ct. 217, 39 L.Ed. 280 (1895); Burnham Chemical Co. v. Borax Consolidated, 170 F.2d 569, 576 (9th Cir. 1948), cert. denied, 336 U. S. 924, 69 S.Ct. 655, 93 L. Ed. 1086 (1949).]

Specifically, the problem is to determine which of two California statutes applies: one providing a three-year period to govern actions to recover upon a statutory liability "other than a penalty or forfeiture" [Cal. C.C.P. § 338(1)], and the other providing a one-year period to govern actions to recover "upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the State * * *." [Cal. C.C.P. § 340(1)].

This action was commenced in September of 1956—more than two and one-half years after the date of accrual of plaintiffs' alleged cause—and so would be barred if deemed a statutory "penalty or forfeiture" within the meaning of the one-year limitation provisions of Cal. C.C.P. § 340(1). On the other hand, if the three-year period of Cal.C.C.P. § 338(1) is properly applicable, then the action was not "barred under existing law" as of the effective date of the 1955 Federal statute, and so defendants' plea of time bar would fail. [See 15 U.S.C.A. § 15b.]

The correct method whereby to determine which State statute of limitations is properly applicable to a cause arising under the antitrust laws prior to the Federal limitations statute has been the subject of some judicial disagreement. One view is that, inasmuch as the private antitrust action involves a Federal cause of action, whatever State limitations period is to be applied turns upon the Federal court's view as to the nature of the Federal action, as being either "remedial" or "penal". [Cf.: Fulton v. Loew's Inc., 114 F.Supp. 676, 682 (D.Kan.1953); Christensen v. Paramount Pictures, 95 F.Supp. 446, 449 (D.Utah 1950); see also Momand v. Universal Film Exchange, 43 F.Supp. 996, 1008-1009 (D.Mass.1942).] And since the Court concluded in the Chattanooga Foundry case, supra, 203 U.S. 390, 27 S.Ct. 65, 51 L.Ed. 241, that actions for treble damages under the Federal antitrust laws are not subject to the general Federal statute of limitations governing actions to recover a "penalty" under the laws of the United States [28 U.S.C. § 791, as amended, id. § 2462 (1948)], it has been reasoned that a State limitations statute dealing with recovery of "penalties" in the State courts cannot in any event be applied to treble-damage claims grounded upon Federal antitrust violations. [See: Greene v. Lam Amusement Co., 145 F.Supp. 346, 348 (N.D.Ga.1956); Wolf Sales Co. v. Rudolph Wurlitzer Co., 105 F.Supp. 506, 509 (D.Colo. 1952).]

The majority view, however, as formulated in recent years, holds that the question of limitations applicable to private antitrust actions was, as Mr. Justice Holmes put it, "left to the local law by the silence of the Statutes of the United States". [Chattanooga Foundry &

Pipe Works v. Atlanta, supra, 203 U.S. at 397, 27 S.Ct. 65.] Moreover, the word "penalty", as applied in a Federal statute such as 28 U.S.C. § 2462, obviously may have "a different meaning than the same word in the * * * [State] statute". [Bertha Building Corp. v. National Theatres Corp., 269 F.2d 785, 788 (2d Cir. 1959), cert. denied, 361 U.S. 960, 80 S.Ct. 585, 4 L.Ed. 2d 542 (1960).] Accordingly, in keeping with the principle that statutory construction by a State's highest court is deemed an integral part of the text of the State's statute of limitations, it has been declared that Federal courts "must accept the statutes as construed and interpreted by the * * * [State] courts. It is for them to determine what is meant by the word 'penalty' in the * * * [State] statute." [Bertha Building Corp. v. National Theatres Corp., supra, 269 F.2d 785, 788 (2d Cir. 1959), cert. denied, 361 U.S. 960, 80 S.Ct. 585, 4 L.Ed.2d 542 (1960); cf.: Moore v. Illinois Central R. Co., 312 U.S. 630, 634, 61 S.Ct. 754, 85 L.Ed. 1089 (1941); Costello v. Bank of America, 246 F.2d 807, 812 (9th Cir. 1957).]

Adherence to the rationale just stated has required the Federal courts to compare the nature of the Federal treble-damage antitrust action with that of analogous State causes, as construed by the courts of the particular State involved, and from such a comparison to decide which local statute of limitations the courts of the State would deem applicable to actions embracing Federal treble-damage antitrust claims. [See: North Carolina Theatres, Inc. v. Thompson, 277 F.2d 673 (4th Cir. 1960); Powell v. St. Louis Dairy Co., 276 F.2d 464 (8th Cir. 1960); Bertha Building Corp. v. National Theatres Corp., supra, 269 F.2d 785; Gordon v. Loew's

Inc., 247 F.2d 451 (3rd Cir. 1957); Green v. Wilkinson, 234 F.2d 120 (5th Cir. 1956); Hoskins Coal & Dock Corp. v. Truax Traer Coal Co., 191 F.2d 912 (7th Cir. 1951), cert. denied, 342 U.S. 947, 72 S.Ct. 555, 96 L.Ed. 704 (1952); Leonia Amusement Corp. v. Loew's Inc., 117 F. Supp. 747 (S.D.N.Y.1953); and see: Cope v. Anderson, 331 U.S. 461, 67 S.Ct. 1340, 91 L.Ed. 1602 (1947); Englander Motors, Inc. v. Ford Motor Co., 293 F.2d 802, 806 (6th Cir. 1961); Nomand v. Universal Film Exchanges, 172 F.2d 37, 47 (1st Cir. 1948), cert. denied, 336 U.S. 967, 69 S.Ct. 939, 93 L.Ed. 1118 (1949); United Banana Co. v. United Fruit Co., 172 F.Supp. 580, 585 (D. Conn. 1959); compare: Brady v. Daly, 175 U.S. 148, 20 S.Ct. 62, 44 L.Ed. 109 (1899); Huntington v. Attrill, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123 (1892).]

[2] A study of the decisions convinces me that the precedent of seeking guidance from the construction given a particular limitations statute by State courts is a sound one to follow in the case at bar, notwithstanding the inherent difficulty of diverse judicial interpretations in the various States as to the essential nature of private multiple-damage actions. [See: North Carolina Theatres, Inc. v. Thompson, supra, 277 F.2d 673; Bertha Building Corp. v. National Theatres Corp., supra, 269 F.2d 785; Englander Motors, Inc. v. Ford Motor Co., 186 F.Supp. 82, 90 (N.D.Ohio 1960), modified on other grounds, 293 F.2d 802 (6th Cir. 1961).]

Turning, then, to the scope of the three-year [Cal. C.C.P. § 338(1)] and the one-year [Cal.C.C.P. § 340-(1)] statutes in question here, as construed by the State courts, it is noted that although the California courts have not as yet interpreted for limitations pur-

poses a similar private-action provision under the State's antitrust law [see Cal.Bus. & Prof. C. § 16750, as amended, Id. § 16750(a), (1959)], they have considered the applicability of both § 338(1) and § 340(1) on several occasions in cases involving circumstances closely analogous to those presented at bar. For example, a statutory provision for recovery of twice the amount paid to a decedent in excess of legally-incurred payments under the State Old Age Security Law has been characterized as "penal", and hence the one-year period of limitations specified in § 340(1) was held applicable. [Department of Social Welfare v. Stauffer, 56 Cal. App.2d 699, 133 P.2d 692 (1943).]

The same result was reached where "liquidated damages" were imposed by statute for failure of gas and electric companies to supply requisite power [Hansen v. Vallejo Electric Light & Power Co., 182 Cal. 492, 188 P. 999 (1920); compare Los Angeles County v. Ballerino, 99 Cal. 593, 32 P. 581, 34 P. 329 (1893)]; where court reporter fees were reduced for failure to comply with court rules [County of San Diego v. Milotz, 46 Cal.2d 761, 300 P.2d 1 (1956)]; and where a buyer sued for return of the amount paid under a conditional sale contract upon the seller's interference with payment of the balance of the debt prior to maturity [Stone v. James, 142 Cal.App.2d 738, 299 P.2d 305 (1956)].

The California courts have also characterized as "penal" a statutory provision for double damages in trespass actions involving timber [Helm v. Bollman, 176 Cal.App.2d 838, 1 Cal.Rptr. 723 (1959); cf. Swall v. Anderson, 60 Cal.App.2d 825, 141 P.2d 912 (1943)]; likewise a statutory provision for treble damages in actions for unlawful detainer [see: Hoban v. Ryan, 130

Cal. 96, 62 P. 296 (1900); Gwinn v. Goldman, 57 Cal. App.2d 393, 134 P.2d 915 (1943)], as well as for damages to adjacent property caused by fire [Clark v. San Francisco & S. J. Val. Ry. Co., 142 Cal. 614, 76 P. 507 (1904); see also Esposti v. Rivers Bros., 207 Cal. 570, 279 P. 423 (1929).]

While there has been no such concurrence of views as to the proper characterization of Federal treble-damage anti-trust actions [see: Schiffman Bros. v. Texas Co., 196 F.2d 695, 697 (7th Cir. 1952); Leonia Amusement Corp. v. Loew's Inc., supra, 117 F.Supp. at 756; and see Loevinger, Private Action—The Strongest Pillar of Antitrust, 3 Antitrust Bull. 167 (1958)], it is reasonable to characterize such actions as compensatory in part, and as exemplary or penal with respect to the trebling of damages to business or property resulting from antitrust violations [see Lyons v. Westinghouse Electric Corp., 222 F.2d 184, 189 (2nd Cir.), cert. denied, 350 U.S. 825, 76 S.Ct. 52, 100 L. Ed. 737 (1955); cf. Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 365 (9th Cir. 1955)].

Moreover, the California Supreme Court has characterized as a penalty "any law compelling a defendant to pay a plaintiff other than what is necessary to compensate him for a legal damage done him by the former". [Miller v. Municipal Court, 22 Cal.2d 818, 837, 142 P.2d 297, 308 (1943); see also Grossblatt v. Wright, 108 Cal.App.2d 475, 239 P.2d 19 (1951).]

The conclusion is thus impelled that § 340(1) of the California Code of Civil Procedure, as construed by the California courts, is applicable to treble-damage causes under the Federal antitrust laws which accrued

prior to the effective date of the four-year Federal limitations period. [15 U.S.C.A. § 15b.] Inasmuch as plaintiffs' cause of action admittedly accrued in February of 1954, and this action was not commenced until September of 1956, application of the one-year period specified in § 340(1) would clearly raise the time bar upon which defendants rely for summary judgment of dismissal.

Before this conclusion can be embraced, however, consideration must be given to the fact that our Court of Appeals for the Ninth Circuit has indicated on occasion that the proper California statute of limitations to be applied in Federal treble-damage antitrust actions is the three-year period provided in Cal. C.C.P. § 338-(1) [see Burnham Chemical Co. v. Borax Consolidated, supra, 170 F.2d at 578; compare Culver v. Bell & Loffland, 146 F.2d 29 (9th Cir. 1944)]; and has at other times adopted the mutual view of the parties to the particular action that § 338(1) governed. [Steiner v. 20th Century-Fox Film Corp., supra, 232 F.2d at 194; Suckow Borax Mines Consol. v. Borax Consolidated, supra, 185 F.2d at 207.] It is at once apparent that these cases antedate enunciation of the present majority view that State statutes of limitations should be applied as construed by the courts of the particular State. And analysis reveals that in none of these Ninth Circuit cases was the Court of Appeals required to choose between Cal.C.C.P. § 338(1) and § 340(1), since in each case the action was barred under both statutes by the lapse of more than three years. [See also Foster & Kleiser Co. v. Special Site Sign Co., 85 F.2d 742 (9th Cir. 1936), cert. denied, 299 U.S. 613, 57 S.Ct. 315, 81 L.Ed. 452 (1937).]

Nor was it necessary for the District Courts in Manny v. Warner Bros. Pictures, 116 F.Supp. 807 (S.D.Cal.1953), and in Levy v. Paramount Pictures, 104 F.Supp. 787 (N.D.Cal.1952), to choose between § 338(1) and § 340(1), for in each instance the action was "barred by both sections". [Manny v. Warner Bros. Pictures, supra, 116 F.Supp. at 809; compare Aero Sales Co. v. Columbia Steel Co., 119 F.Supp. 693 (N.D.Cal.1954).]

In United West Coast Theatres Corp. v. South Side Theatres, 86 F.Supp. 109 (S.D.Cal.1949), it was assumed by both Court and counsel that the Federal treble-damage antitrust counterclaim was time-barred by either § 338(1) or § 340(1), unless the applicable California statute of limitations was suspended under either the Act of October 10, 1942 [56 Stat. 781; see 86 F. Supp. at 110-111], or § 5 of the Clayton Act [15 U.S.C.A. § 16; see 86 F.Supp. at 113]. It was also assumed, at least by the Court, and erroneously as it now appears, that the Court of Appeals had been called upon to decide the question, and had held § 338(1) to be the California statute of limitations properly applicable to actions for treble damages arising under the Federal antitrust laws. [See: 86 F.Supp. at 111 and Burnham Chemical Co. v. Borax Consolidated, supra, 170 F.2d at 578.]

[3] Worth repeating here is the venerable admonition of Mr. Chief Justice Marshall: "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the

very point is presented for decision". [Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399, 5 L. Ed. 257 (1821); cf.: Armour & Co. v. Wantock, 323 U.S. 126, 132-133, 65 S.Ct. 165, 89 L.Ed. 118 (1944); Mutual Benefit Health & Accident Ass'n v. Bowman, 99 F.2d 856, 858 (8th Cir. 1938), cert. denied, 306 U.S. 637, 59 S.Ct. 485, 83 L. Ed. 1038 (1939); Julian Petroleum Corp. v. Courtney-Petroleum Co., 22 F.2d 360, 362 (9th Cir. 1927).]

[4] In the case at bar, "the very point is presented for decision": whether the three-year period provided in § 338(1), or the one-year period provided in § 340(1), is the California statute of limitations properly applicable to a treble-damage cause of action arising under the Federal antitrust laws and accruing prior to the effective date of the four-year Federal statute of limitations provided in 15 U.S.C.A. § 15b. Treating the question as *res integra*, as I now deem it to be, and having due regard for State-court interpretation of the content of the provisions of both § 338(1) and § 340-(1), I must hold that the one-year period specified in Cal.C.C.P. § 340(1) is the California statute of limitations properly applicable to Federal treble-damage antitrust causes accruing prior to the effective date of the Federal four-year statute. [15 U.S.C.A. § 15b.]

[5] Plaintiffs' action is time-barred, then, unless operation of the statute of limitations was suspended by virtue of § 5 of the Clayton Act. [15 U.S.C.A. § 16.] Plaintiffs contend that, in all events, the statute of limitations was tolled during the pendency of a similar action commenced by the United States in this Court, in May of 1950, against defendant Standard Oil and

other companies. [See United States v. Standard Oil Company, et al., Civil No. 11584—C, S.D.Cal.]

At the time the cause of action here asserted by plaintiffs accrued, § 5 of the Clayton Act provided that: "Whenever any suit * * * is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit * * * shall be suspended during the pendency thereof." [15 U.S.C.A. § 16.]

This provision has been strictly construed so that "in order for the statute of limitations to be tolled for private litigants in antitrust conspiracy actions, the matters complained of in the private proceeding must be the same acts to achieve the same conspiracy complained of in the action brought by the United States. * * * A greater similarity is needed than that the same conspiracies are alleged. The same means must be used to achieve the same objectives of the same conspiracies by the same defendants" [Steiner v. 20th Century-Fox Film Corp., supra, 232 F.2d at 196; cf.: Samuel Goldwyn Productions v. Fox West Coast Theatres Corp., 146 F.Supp. 905 (N.D. Cal.1956); Tague v. Balaban, 146 F. Supp. 356 (N.D. Ill.1956); see also: Philco Corp. v. Radio Corporation of America, 186 F.Supp. 155, 159 (E.D.Pa. 1960); United Banana Co. v. United Fruit Co., supra, 172 F.Supp. at 586.]

Applying these criteria, it is clear from comparison of the two cases that pendency of the Government's action in United States v. Standard Oil Company, et al., supra, Civil No. 11584—C, did not operate to suspend the statute of limitations in the case at bar. For in No. 11584-C the Government's charges were directed against an alleged agreement and combination among major oil companies intent upon eliminating competition among themselves, *inter alia,* by controlling prices and the production of petroleum products among independent producers and distributors; whereas, plaintiffs' claim at bar rests, not upon an alleged agreement by the defendant companies to control, but upon an alleged combination to exclude plaintiffs from wholesale gasoline distribution in the Southern California area.

Moreover, in No. 11584-C, the Government alleged that the combination to restrain and monopolize trade in crude and refined oil took form in the year 1936 and continued to the date in 1950 when the complaint was filed; while here plaintiffs allege a conspiracy initiated "in or about the year 1948" and extending to the date of commencement of plaintiffs' action in 1956. Furthermore, the defendants in both cases are not the same: Shell Oil Company and the Conservation Committee of California Oil Proceduers were joined as defendants in No. 11584—C, but not in the action at bar, and Olympic Refining Company was originally joined as a defendant in this case, but not in No. 11584-C. [Cf. Momand v. Universal Film Exchange, supra, 43 F. Supp. at 1011.]

Inasmuch as the one-year limitation period was not suspended by the pendency of the Government's suit in No. 11584-C, it follows that plaintiffs' action is time-barred by the provisions of Cal. C.C.P. § 340(1).

Accordingly, the defendants are "entitled to a judgment as a matter of law" [Fed.R.Civ.P. 56(c)], and the motion for a summary judgment of dismissal will be granted, without costs to any party.

The foregoing shall serve as findings of fact and conclusions of law [Fed.R.Civ.P. 52(a)], and defendants will lodge an appropriate judgment of dismissal with the Clerk, to be settled pursuant to Local Rule 7, within five days. This dismissal shall not constitute an adjudication upon the merits [Fed.R.Civ.P. 41 (b)], and the judgment will so provide.

APPENDIX D.

The foregoing instrument is a
correct copy of the original on
file in this office.

ATTEST: Mar 19 1957

J. L. BROWN, COUNTY CLERK
County Clerk and Ex-officio Clerk of the
Superior Court of the State of California
in and for the County of Fresno
By James G. Huggins, Deputy

FILED
MARCH 10, 1957
J. L. BROWN, CLERK
By J. G. Huggins, Deputy

In the Superior Court of the State of California,
in and for the County of Fresno

No. 97179 Dept. 2

CHARLES S. EHRHORN, doing business as Navy Gas Co.,

Plaintiff,

vs.

CAMINOL COMPANY, a California corporation, WALTER ALLEN, VIRGIL ANDERSON, W. L. MARCONI, JULIAN C. MONTGOMERY, NELLA CORPORATION, A California corporation, SUNLAND REFINING CORPORATION, a California corporation, G. A. OLSEN, and DOES ONE to ONE HUNDRED,

Defendants.

Memorandum and Order on Demurrers and Motions to Strike.

The first cause of action is directed against all defendants and is based on the Cartwright Act. The

second and third causes of action, dealing separately with each of the two groups of defendants, are founded on the Unfair Practices Act.

Two main elements are required in pleading a civil action under the Cartwright Act—first, allegations showing a breach of the Statute, and, secondly, allegations showing damage to the plaintiff. The Court is of the opinion that the defendants are mistaken in their contention that there should be a third element explicitly pleaded, namely, injury to the public. A properly pleaded breach of the Act itself is a sufficient showing of injury to the public. But plaintiff is wrong in supporting that a breach of the Act may be pleaded wholly by general conclusions consisting largely of quotations from the law itself, and wrong in the assumption that a statement of general conclusions of damage to the plaintiff, together with a general averment of damages in the form usually employed in automobile collision cases, is sufficient as pleading. In this type of action it may be permissible to reinforce the pleading of proper facts by the addition of generalizations based on the words of the enactment which a Court might refuse to strike, but the absence of basic factual allegations is fatal to a pleading in a case of this kind. Here the potential factual nexus is so extensive and complex that it behooves a Court at the inception of the litigation, when proper objection is made by defendants, to insist upon a clarification of the position of the plaintiff. It is better to find out at the start whether the plaintiff, if he can prove his allegations, is entitled to recover, than to discover at the end of months of preparation and weeks of trial that the facts produced by the plaintiff do not support the mere general conclusions contained in his complaint.

With respect to the second and third causes of action, similarly, both the Court and the parties should be able to ascertain before the case goes to trial whether if the facts alleged are true the plaintiff has been legally discriminated against in the functional classification and the area in which he does business.

For these reasons, the general demurrers will be sustained.

The Court is of the opinion that the 3-year Statute of Limitations applies.

IT IS ORDERED that the motion of the defendants, Caminol Company, et al, to strike portions of the amended complaint, be, and it hereby is, granted as to the specifications set forth in their notice of motion and numbered 2, 7 to 17, inclusive, and denied as to all other specifications.

IT IS FURTHER ORDERED that the motion of the defendants, Sunland Refining Corporation, et al, to strike portions of the amended complaint be, and it hereby is, granted, as to the specifications set forth in their notice of motion and numbered 4, 6, 8 to 12, inclusive, and denied as to all other specifications.

IT IS FURTHER ORDERED that the demurrer of defendants, Caminol Company, et al, to the amended complaint, be, and it hereby is, sustained as to each and all of the following grounds set forth therein, to wit:

Demurrer to First Cause of Action—Paragraphs I, III (3), (4), (6), (8), (10) to (38) inclusive, (40) to (56) inclusive, IV and V.

Demurrer to Second Cause of Action—Paragraph 1 (to the extent of the specifications as to which the de-

murrer is hereinbefore sustained with respect to the first cause of action). Paragraphs, II, III (1), (3) to (9) inclusive, IV andV, and the demurrer is overruled as to all other specifications.

IT IS FURTHER ORDERED that the demurrer of defendants, Sunland Refining Corporation, et al., to the amended complaint, be, and it hereby is, sustained as to each and all of the following grounds set forth therein, to wit:

Demurrer to First Cause of Action—Paragraphs I, III, IV (4), (9) to (34) inclusive, V and VII.

Demurrer to Third Cause of Action—Paragraph I (to the extent of the specifications as to which the demurrer is hereinbefore sustained as to the first cause of action), Paragraphs II, IV, V (2) and (4), V and VI, and said demurrer is overruled as to all other specifications.

Plaintiff is allowed 20 days within which to serve and file a second amended complaint.

DATED: March 19th, 1957.

PHILIP CONLEY

Judge of the Superior Court

APPENDIX E.

In the Supreme Court of the United States, October Term 1964, No. .....

Marc D. Leh, individually and The Progress Company, a co-partnership comprised of Marc D. Leh and David Brown, co-partners, Petitioners, vs. General Petroleum Corporation, a corporation, Standard Oil Company of California, a corporation, Texaco, Inc., a corporation, Richfield Oil Corporation, a corporation, Union Oil Company of California, a corporation, Tidewater Oil Company, a corporation, Respondents.

Motion for Extension of Time Within Which to File Petition for Writ of Certiorari.

To the Honorable Justice of the Supreme Court of the United States Duly Alloted to the United States Court of Appeals for the Ninth Circuit:

Petitioners move that the time within which they may file a petition for Writ of Certiorari to review the judgment of the Court of Appeals for the Ninth Circuit, entered on the 2nd day of April, 1964, in the cause pending therein above-entitled, be extended from the 1st day of July, 1964, to and including the 1st day of August, 1964.

JURISDICTION

The judgment of the Circuit of Appeals dated April 2, 1964, entitled "Marc D. Leh, individually and The Progress Company, a co-partnership comprised of Marc D. Leh and David Brown, co-partners, Appellants, vs. General Petroleum Corporation, a corporation, Standard Oil Company of California, a corporation, Texaco, Inc., a corporation, Richfield Oil Corporation, a corporation,

Union Oil Company of California, a corporation, Tidewater Oil Company, a corporation, Appellees", No. 18,-333 in the records of the Court of Appeals, was also filed and entered on April 2, 1964. A copy of the opinion of the United States Court of Appeals for the Ninth Circuit is appended hereto. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254 (1).

STATEMENT OF THE CASE

Petitioners' action is for treble damages under Section 4 of the Clayton Act (15 U.S.C. §15), arising from the alleged violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2). The Court of Appeals affirmed a judgment of dismissal below upon the ground that the Statute of Limitations had run against Petitioners. Since Petitioners' cause of action accrued no later than February, 1954, the four year Federal limitations period with respect to private causes of action under the Anti-Trust Laws is inapplicable. The questions presented are (i) What is the applicable Statute of Limitations, and (ii) Whether that Statute of Limitations was tolled or suspended under § 5 of the Clayton Act (15 U.S.C. §16, as amended 15 U.S.C. §16(b), 1955) by a similar proceeding "instituted by the United States."

REASONS WHY THE GRANTING OF AN EXTENSION OF TIME IS DEEMED JUSTIFIED

1. This matter presents a serious question of characterization of the Anti-Trust Laws as penal or compensatory. The Court of Appeals comes out quite strongly in characterizing the Anti-Trust action as penal. This is contrary to the announced position of

this Court in *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 1906, 203 U. S. 390, 397.

2. Several additional important and serious questions are presented:

(a) Whether resort must be had to State law for "Characterization" of the cause of action created by 15 U. S. C. § 15;

(b) Whether the Court of Appeals was correct in determining only whether the trial court's conclusion and opinion were "clearly erroneous", on what would appear to be a pure question of law;

(c) Whether the Court of Appeals ignored *United States v. Gerlach Livestock Co.*, 1950, 339 U. S. 725, 753, in determining the binding effect of a decision of the Superior Court of the State of California upon a Federal Court;

(d) What constitutes a similar proceeding "instituted by the United States" so as to toll or suspend the applicable Statute of Limitations.

3. That the attorney for petitioners is a sole practitioner, without partners or associates, and that he has diligently researched the above questions to prepare a Petition for Certiorari thereon, but that the complexity of the problems presented require additional time to complete writing of the Petition for Certiorari and printing thereof;

4. That additionally the attorney for petitioners is engaged in a jury trial which is estimated to last two weeks, and that during this time he will be unable to devote his full attention to the additional research and writing required on the Petition for Certiorari, but that the petition should be completed and filed within the additional thirty days requested.

5. That the opinion of the Court of Appeals clearly mis-applies, and in effect refuses to follow, the opinion of this Court in *Chattanooga Foundry & Pipe Works vs. City of Atlanta*, 1960, 203 U.S. 390, 397.

Respectfully submitted,

/s/ RICHARD G. HARRIS
Attorney for Petitioners

EXHIBIT A

Supreme Court of the United States No. ....., October Term, 1964.

Marc D. Leh, et al., Petitioners, vs. General Petroleum Corp., et al.

Order Extending Time to File Petition for Writ of Certiorari.

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 1, 1964.

/s/ Arthur J. Goldberg
Associate Justice of the Supreme
Court of the United States.

Dated this 29th day of June, 1964.
